162 *Order Directing Transfer of Insurance.*

At a Term of the United States District Court for the Northern District of New York, held in the United States Court Room in the City of Utica, on the 6th day of September, 1904.

Present—Hon. George W. Ray, United States District Judge.

In the District Court of the United States for the Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts.

Albert K. Hiscock, the trustee in bankruptcy of the bankrupts above named, having heretofore filed his petition verified January 26, 1904, praying that an order might be made by this Court, requiring Jacob M. Mertens to deliver and transfer to this pe-
163 titioner, by good and sufficient assignments, the life insurance policies hereinafter mentioned, which policies were claimed in said petition to be vested in said petitioner, and said petition with a notice of motion returnable before this Court on January 28, 1904, and with an admission of due and personal service thereof upon said Jacob M. Mertens having been presented to this Court on said 28th day of January, 1904, and said bankrupt, Jacob M. Mertens, having then and there appeared and filed his answer by Wilson, Cobb & Ryan, of Syracuse, N. Y., his attorneys, thereby denying the right of said trustee to the relief asked for by him in said petition and an order having been then and there made by this Court, referring said matter to Charles L. Stone, of Syracuse, N. Y., as Special Master, to hear the evidence and take the proofs of the parties relating to the facts and matters set forth in said petition and answer and to report the same with his findings of fact and conclusions of law, and the said parties having appeared before said Special Master and submitted their proofs and the said Referee having made his report, dated June 7, 1904, and the same having been filed, whereby it was found by said Referee that the said policies passed to and became the property of the said trustee in bankruptcy, and said bankrupt by his attorneys having thereafter filed his exceptions to said findings and report of said Referee, and a motion for the confirmation of said report having thereafter been made at a term of this Court, held at the United States Court Room in the City of Binghamton, Broome County, New York, on June 14, 1904, and having been thereupon adjourned, and the said parties having appeared before this Court, said Albert K. Hiscock aforesaid appearing by Lewis & Crowley, his attorneys, and the said bankrupt, Jacob M. Mertens, appearing by
164 Wilson, Cobb & Ryan, his attorneys, and said exceptions having been argued and said report and the questions raised

thereby having been submitted to this Court and due deliberation having been had, now, on motion of Lewis & Crowley, attorneys for Albert K. Hiscock, as trustee in bankruptcy of the estates of said bankrupts, and after hearing Wilson, Cobb & Ryan, attorneys for said bankrupt, Jacob M. Mertens, in opposition thereto, it is

Ordered and adjudged, that the report of said Special Master, Charles L. Stone, herein dated June 7, 1904, be and the same is hereby in all respects confirmed, and the said exceptions filed by the said bankrupt to said report be and the same are each and all overruled. It is further

Ordered and adjudged, that the policies of insurance set forth in said petition, to wit, policy No. 274445 for $20,000, issued by the Equitable Life Assurance Society of the United States upon the life of Jacob M. Mertens and dated March 8, 1884, and policy No. 415668, for $20,000, issued by the Equitable Life Assurance Society of the United States upon the life of Jacob M. Mertens, and dated January 23, 1889, and policy No. 417171 for $50,000, issued by the Equitable Life Assurance Society of the United States upon the life of Jacob M. Mertens and dated February 15, 1889, and all the rights, title and interest of Jacob M. Mertens in and to each of said policies, and the rights, powers and property represented thereby have passed to and are the property of Albert K. Hiscock, as trustee in bankruptcy of the estate of Jacob M. Mertens and now are and remain in him. And it is further

Ordered and adjudged, that the said Jacob M. Mertens upon demand execute and deliver any and all assignments, releases and other papers necessary to constitute proper vouchers in pro-
165 tection of said Life Assurance Society in treating the said trustee as the owner of said policies, respectively, and execute and deliver upon demand to said trustee all assignments and releases which may be required by said trustee or said Life Assurance Society, or which may be advisable in order to permit of the sale of said policies by said trustee, or the exercise of the options provided in said policies by said trustee or the collection of any moneys due or to become due from said Life Assurance Society upon the said policies or either of them.

Witness the Hon. George W. Ray, Judge of said Court, and the seal thereof, at the city of Utica, on the 6th day of September, 1904.

Enter.

GEO. W. RAY,
U. S. Judge.

166 In the District Court of the United States for the Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts.

Due and timely service of notice of an application for the annexed order to be made to the United States District Court for the

Northern District of New York on September 6, 1904, is hereby admitted.

Dated September 5, 1904.

WILSON, COBB & RYAN,
Att'ys for Bankrupts.

(Endorsed:) Order directing transfer of insurance.—Filed Sep. 8, 1904.—W. S. Doolittle, Clerk.

167 In the United States District Court for the Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts.

Jacob M. Mertens, one of the bankrupts above named, feeling aggrieved by the order and decree in the above entitled proceeding, bearing date the 6th day of September, 1904, and filed and entered in the office of the Clerk of this Court on the 8th day of September, 1904, and which said order confirmed the report of Hon. Charles L. Stone, Special Master herein, hereby appeals from said order and decree to the United States Circuit Court of Appeals for the Second Circuit and petitions this Court for an order allowing said Jacob M. Mertens, Bankrupt, to appeal from said decree to the United States Circuit Court of Appeals for the Second Circuit, and prays that the amount of the bond on appeal be fixed at Two Hundred and Fifty ($250.00) Dollars, and a transcript of the record herein be
168 transmitted to said Circuit Court of Appeals.

Dated December 14, 1904.

WILSON, COBB & RYAN,
Complainant's Solicitors.

On the foregoing petition and the assignment of errors,

Ordered, that the said petition be and the same is hereby granted and the appeal of said Jacob M. Mertens to the United States Circuit Court of Appeals for the Second Circuit from the final order and decree entered and filed in the above entitled cause on the 8th day of September, 1904, be and it is hereby allowed, and such allowance is hereby made as of November 14, 1904, and further

Ordered, that the amount of the bond on said appeal be, and the same hereby is, fixed at the sum of Two Hundred and Fifty ($250.00) Dollars, and leave is hereby given Complainant to elect to file a bond of Two Hundred and Fifty ($250.00) Dollars, or deposit said sum with the Registry of this Court, subject to the order of the Court, and further

Ordered, that a certified transcript of the record and proceedings herein be transmitted to said United States Circuit Court of Appeals,

except such parts as Complainant and defendant may stipulate in respect to .

Dated December 14th, 1904.

GEO. W. RAY,
United States District Judge.

(Endorsed:)—Petition and Order.—Filed Dec. 16, 1904.—W. S. Doolittle, Clerk.

169 *Notice of Appeal.*

In the District Court of the United States for the Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts.

To Albert K. Hiscock, Trustee in Bankruptcy of the Estates of the above named Bankrupts, and Lewis & Crowley, Solicitors for the said Trustee:

You are Hereby Notified that the above named Jacob M. Mertens, hereby appeals from the order and decree in the above entitled proceeding, bearing date the 6th day of September, 1904, and entered and filed in the office of the Clerk of this Court on the 8th day of September, 1904, and which said order confirmed the report
170 of Hon. Charles L. Stone, Special Master herein, to the United States Circuit Court of Appeals for the Second Circuit.

Dated December 16th, 1904.

WILSON, COBB & RYAN,
Solicitors for Jacob M. Mertens, Appellant.

Office and Post Office Address, 15 Third National Bank Building, Syracuse, N. Y.

(Endorsed:)—Notice of Appeal.—Filed Dec. 19, 1904.—W. S. Doolittle, Clerk.

In the District Court of the United States for the Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts.

Whereas, lately at a term of the District Court of the United States for the Northern District of New York, in a proceeding instituted by the petition of Albert K. Hiscock, Trustee in Bank-
171 ruptcy of the estate of the above named Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens and Edmund A. Mer-

tens, praying for an order requiring the above named Jacob M. Mertens, Bankrupt, to assign, transfer and set over to him certain policies of life insurance therein described, an order and decree was made granting the prayer of said petition and confirming the report of Hon. Charles L. Stone, Special Master herein, and said Jacob M. Mertens having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Second Circuit from said order and decree, and a citation to said Albert K. Hiscock, as trustee aforesaid, having been granted, admonishing him to appear before said Court of Appeals, now, therefore,

The Bankers Surety Co., having an office and usual place of business at Cleveland, Ohio, does hereby pursuant to the Statute in such case made and provided, undertake that the Appellant, Jacob M. Mertens, shall prosecute his appeal to effect, and if he shall fail to make good his plea, shall answer for all costs awarded against him upon said appeal, not exceeding the sum of Two Hundred and Fifty ($250.00) Dollars.

Dated Syracuse, N. Y., December 14th, 1904.

THE BANKERS' SURETY CO.,
CLARENCE W. DARLING,
Third Vice-President.
WILLIS H. MICHEL,
Assistant Secretary.

[SEAL.]

172 STATE OF NEW YORK,
County of Onondaga, City of Syracuse, ss:

On this 14th day of December, 1904, before me personally came Clarence W. Darling, to me known and who being by me duly sworn did depose and say: that he resides in the City of Syracuse, New York; that he is the Third Vice-President of the Bankers Surety Company; the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed to said instrument by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

CLARENCE W. DARLING.

Subscribed and sworn to before me this 14th day of December, 1904.

L. HAIGHT,
Notary Public.

STATE OF NEW YORK,
County of Onondaga, City of Syracuse, ss:

On this 14th day of December, 1904, before me personally came Willis H. Michel, to me known and who being by me duly sworn did depose and say: that he resides in the City of Syracuse, New York; that he is the Assistant Secretary of the Bankers Surety Company; the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed

to said instrument by order of the Board of Directors of said
173 corporation, and that he signed his name thereto by like order.

WILLIS H. MITCHEL.

Subscribed and sworn to before me this 14th day of December, 1904.

L. H. HAIGHT,
Notary Public.

Extract from the minutes of the meeting of the Board of Directors of the Bankers Surety Company, held at the Company's office in the City of Cleveland, Ohio, on Tuesday, March 31st, 1903, at 1.30 p. m.

"There being a quorum of the Directors present, Mr. Olmsted "was elected Chairman of the meeting.

"The following preamble and resolution was duly moved and "seconded and unanimously adopted:

"Whereas, The Bankers Surety Company, in order to facilitate "its business of becoming surety on bonds, is required to execute "bonds in places other than the Home Office, upon application being "made for same; and

"Whereas, this Board is authorized by the By-Laws of this Com- "pany to appoint Third Vice-Presidents and Assistant Secretaries "as in their judgment the interests of the Company require;

"Therefore, Be it resolved, that this Board do proceed to elect "two Third Vice Presidents and one Assistant Secretary for the "State of New York, to hold their respective offices during the "pleasure of the Board, with only the following powers, to-wit:

"That either of said Third Vice-Presidents may, jointly with said "Assistant Secretary in the State of New York, subject to the ex- "ception, that no one person shall, in executing any bond, obligation
"or undertaking, act both as Third Vice President and as
174 "Assistant Secretary, sign, seal, acknowledge and deliver
"for and on behalf of said The Bankers Surety Company in "the State of New York, subject to the following condition:

"A. Any and all bonds, obligations and undertakings required "in judicial proceedings in any and all courts sitting or held in the "State of New York, including U. S. Circuit and District Courts, "also all bonds, obligations and undertakings required in any and "all proceedings in any Probate, Orphan's or Surrogate's Courts "sitting or held in the aforesaid State, and including also the exe- "cution of bonds of indemnity to sheriff or sheriffs in the aforesaid "State.

"B. Any and all bonds required by the United States Govern- "ment to be filed with the Internal Revenue Bureau of the Treas- "ury Department for the proper conduct of any tobacco or spirit "manufacturing business, including warehousing bonds, transporta- "tion bonds, transportation for warehousing bonds, export bonds, "distillers' annual bonds, tobacco and cigar manufacturers' bonds, "and any and all other bonds which may be required either by the

"Revenue Statutes or the Internal Revenue Bureau of the Treasury "Department of the United States, covering also the execution of "such consents as may be necessary in connection therewith;

"C. Any and all bonds guaranteeing the faithful performance of "contracts for the construction of any work or improvement, either "public or private which may be required by the statutes of any "State, rules or ordinances of any board, commission or public cor-
"poration, or private contracts, not including however, bonds
175 "which guarantee the payment of rentals or leaseholds, char-
"ter parties or instruments of like nature;

"D. Any and all bonds required to be filed by public officers "elected in said State (except treasurers and officers collecting taxes) "in qualifying for office; the said bonds being conditioned for the "faithful discharge of their duties and accounting for and paying "over the funds coming into their hands as such officers or in "such terms as by statute required;

"E. Any and all bonds required by the State of New York or "any City, Town or County in said State to be given or filed in "any City, Town or County of said State under the provisions "of the liquor tax law of the State of New York (Laws of 1896, "Chapter 112, as amended by the laws of 1897, Chapter 312) and "the various acts amendatory thereof and supplementary thereto.

"Condition.—All such bonds, obligations and undertakings shall "be executed in the name of the said The Bankers Surety Company "by either of said Third Vice Presidents jointly with said Assistant "Secretary as herein before provided and the seal of said Com-"pany shall be thereto attached; and

"Any and all such bonds, obligations and undertakings so exe-"cuted shall be binding upon said The Bankers Surety Company "to all intents and purposes as fully as if done by the President and "Secretary of the Company in their own proper persons in its "behalf.

"The Chair then announced that nominations for the two Third "Vice Presidents and one Assistant Secretary for the State of New "York, pursuant to the foregoing resolution, were in order; where-
"upon Leonard T. Haight and Clarence W. Darling were
176 "duly nominated for such Third Vice Presidents and Wil-
"liam H. Michel was nominated for such Assistant Secretary. "There being no further nominations, on motion duly seconded "and carried, the Secretary was authorized to cast the ballot on "behalf of the Directors present and the aforementioned nominees "were declared to have been unanimously elected to their respective "offices."

* * * * * * *

We, D. A. Macbeth, 2nd Vice President and Howard H. Burgess, Secretary of The Bankers Surety Company aforesaid, severally certify that we have compared the foregoing extract of the minutes of the meeting of the Board of Directors of said Company held on the 31st day of March, 1903, with the original thereof as recorded in the minute book of said Board of Directors of said Company, and that the same is a true and correct extract therefrom and includes all the proceedings of said meeting in reference to the officers therein referred to.

In Testimony Whereof, we the said D. A. Macbeth and said Howard H. Burgess hereunto subscribe our names as such 2nd Vice President and Secretary respectively, and have hereto affixed the seal of said Company this 28th day of January, A. D. 1904.

D. A. MACBETH,
[SEAL.] *2nd Vice President.*
HOWARD H. BURGESS, *Secretary.*

177 *The Bankers Surety Company of Cleveland, Ohio, Showing Financial Condition March* 31, 1904.

Assets.

Par value.		Market value.
$95,000 00	United States Coupon Bonds, 3 per cent...	$102,600 00
40,000 00	United States Register Bonds, 3 per cent..	43,200 00
25,000 00	City of Dayton, Ohio, School Bonds, 4 per cent.....	27,046 51
25,000 00	City of Cleveland, Ohio, Sewer Bonds, 4 per cent.	27,935 62
39,000 00	Lakewood, Ohio, Sewer Bonds, 4 per cent..	40,515 52
8,500 00	Glenville, Ohio, Sewer Bonds, 5 per cent..	8,948 64
20,000 00	Belmont County, Ohio, Sewer Bonds, 4 per cent.	21,436 21
3,000 00	Franklin County, Ohio, Bonds, 4 per cent.	3,149 88
19,000 00	City of Cambridge, Ohio, Bonds, 4 per cent.	20,796 57
14,000 00	Guernsey County, Ohio, Bonds, 4 per cent.	14,890 69
2,300 00	Coal & Iron National Bank, (Cleveland, Ohio), Stock.....	2,500 00
2,500 00	First National Bank, (Cleveland, Ohio), Stock	3,875 00
178		
5,000 00	Market National Bank, (Cleveland, Ohio), Stock.....	5,565 00
30,000 00	Steel Steamship Gold Bonds, 5 per cent..	30,000 00
5,000 00	Howell Davis Brant Co. Bonds.....	5,000 00
	Interest accrued	7,116 25
	Bills Receivable	5,141 64
	Furniture and Fixtures.....	3,137 75
	Outstanding Premiums less Commissions	24,852 24
	Cash in Office and Banks	44,407 64
	Collateral Loans	104,136 86
	Mortgage Loans	141,425 00
		$687,677 02

Liabilities.

Capital Stock.....		$500,000 00
Reserve for Unadjusted Claims		9,098 03
Re-insurance:		
Reserve.....	$75,547 98	
Surplus.....	103,031 01	
		178,578 99

We, D. A. Macbeth, 2nd Vice President and Wm. G. Rippey, Assistant Secretary respectively of the Bankers Surety Company, do hereby certify that the foregoing is a true statement of the assets and liabilities of the said Company on the date above stated. In testimony whereof, we hereunto set our hands and affix the
179 seal of the Company this 27th day of April, 1904.

D. A. MACBETH,
2nd Vice President.
WM. G. RIPLEY,
Assistant Secretary.

Sworn to and subscribed before me this 27th day of April, 1904.
FREDERICK H. JOHNSON,
[SEAL.] *Notary Public.*

(Endorsed:) Undertaking on appeal by Bankrupt, Jacob M. Mertens from Order to the Circuit Court of Appeals.—The within bond is approved as to form and sufficiency of sureties and is hereby allowed.—Geo. W. Ray, U. S. J.—Filed Dec. 16, 1904.

In the District Court of the United States for the Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND T. MERTENS, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co," Bankrupts.

This Court having made its final order and decree in the
180 above entitled proceeding, which bore date September 6th, 1904, which confirmed the report of Hon. Charles L. Stone, Special Master herein, bearing date the 7th day of June, 1904, and which also, among other things, adjudged that the title to certain policies of life insurance in issue herein, and all the rights, powers and property represented thereby had passed to Albert K. Hiscock, as trustee in Bankruptcy of the above named Jacob M. Mertens, Bankrupt, and the said Jacob M. Mertens feeling aggrieved by the said order and decree and desiring to appeal therefrom, now says that in the record and proceedings of the Court in said proceeding there is manifest error, and for error, the Complainant assigns the following:

1. The Court erred in granting the relief prayed for in said petition filed herein.

2. The Court erred in refusing to dismiss the said petition.

3. The Court erred in confirming the order of the said Special Master and overruling the exceptions filed by the said Jacob M. Mertens, Bankrupt, to the report of said Special Master.

4. The Court erred in overruling the first exception filed by the said Jacob M. Mertens, Bankrupt, to the report of said Special Master, and in holding that the said report was in the form required

by law and in conformity with Rule 76 and that the Special Master had not exceeded his jurisdiction and power.

5. The Court erred in confirming the ruling of the Special Master and overruling the second exception filed by the Bankrupt, Jacob M. Mertens, to his report.

181 6. The Court erred in confirming the second conclusion of law contained in the report of said Referee and Special Master, and specifically in sustaining his conclusion that all the remaining right, title and interest of Jacob M. Mertens, Bankrupt, in and to each and all of the policies therein mentioned, and to all rights, powers and property represented thereby, had passed to Albert K. Hiscock, Trustee of his estate in said bankruptcy proceeding, and that they remained in him subject only to the just and lawful claims of the holders of said policies respectively, as security for the loans and advances made upon the security thereof, and in overruling the exception of the said Jacob M. Mertens, Bankrupt, thereto.

7. The Court erred in confirming the second conclusion of law contained in the report of said Special Master, and particularly the portion thereof wherein said Special Master reports that the said Jacob M. Mertens should upon demand execute any and all assignments, releases and other papers necessary to constitute proper vouchers in protection of said life assurance society in treating with said trustee as the owner of said policies respectively, and in overruling the exception of the said Jacob M. Mertens, Bankrupt, to that portion of the said report of the said Special Master, being the fourth exception filed by the said Jacob M. Mertens.

8. That the Court erred in its order and decree in ordering and adjudging that the said policies of insurance and all the rights, title and interest of said Jacob M. Mertens in and to each of said policies and the rights, powers and property represented thereby had passed to and were the property of Albert K. Hiscock, as Trustee in Bankruptcy of the estate of the said Jacob M. Mertens.

182 9. That the Court erred in its order and decree in ordering and adjudging that the said Jacob M. Mertens upon demand execute and deliver any and all assignments, releases and other papers necessary to constitute proper vouchers in protection of said life assurance society in treating the said trustee as the owner of said policies respectively and to execute and deliver upon demand to said trustee all assignments and releases which might be required by the said trustee or said life assurance society or which might be advisable in order to permit of the sale of said policies by the said Trustee or the exercise of the options provided in said policies by the said trustee, or the collection of any moneys due or to become due from said life assurance society upon said policies or either of them.

10. That the Court erred in refusing to hold that the policies involved in this proceeding had a cash surrender value.

11. That the Court erred in refusing to permit said Jacob M. Mertens to pay such cash surrender value to the trustee, and upon such payment, to continue to hold, own and carry said policies, free from the claims of creditors participating in the distribution of his estate under the bankruptcy proceedings.

12. That the Court, having refused to hold that the said policies had a cash surrender value, erred in failing to adjudge that the said policies were the property of the Bankrupt, Jacob M. Mertens, subject only to such incumbrances as had been placed thereon prior to the bankruptcy proceeding.

183 13. That the Court erred in refusing to hold that Albert K. Hiscock, as trustee of the Bankrupt's estate, had no interest in said policies.

Wherefore, said Jacob M. Mertens, Bankrupt, prays that said order and decree be reversed and that said Court be directed to enter a decree in accordance with the prayer of said Jacob M. Mertens or for such relief as he is entitled to in law and equity.

WILSON, COBB & RYAN,
Solicitors for Jacob M. Mertens, Bankrupt.

Office and Post Office address, No. 15 Third National Bank Bldg., Syracuse, New York.

(Endorsed)—Assignment of Errors.—Filed Dec. 16, 1904.—W. S. Doolittle, Clerk.

We the undersigned do hereby admit due, timely and sufficient personal service upon us of the citation annexed this 17th day of December, 1904.

A. K. HISCOCK,
Trustee in Bankruptcy of the Estate of Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens, and Edmund A. Mertens, Individually and as Composing the Co-partnership Firm of J. M. Mertens & Co., Bankrupts.
CEYLON H. LEWIS AND
WILL B. CROWLEY,
Solicitors for Said Albert K. Hiscock as Such Trustee as Aforesaid.

184 UNITED STATES OF AMERICA:

The President of the United States to Albert K. Hiscock, Trustee in Bankruptcy of the estate of Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens, and Edmund A. Mertens, individually and as composing the co-partnership firm of "J. M. Mertens & Co.," Bankrupts:

Whereas, Jacob M. Mertens, Bankrupt, has recently appealed to the United States Circuit Court of Appeals for the Second Circuit from the final order and decree rendered by the United States District Court in and for the Northern District of New York, on the 6th day of September, 1904, and filed and entered in the office of the Clerk of said Court on the 8th day of September, 1904, in a certain proceeding where- said Jacob M. Mertens, Bankrupt, is the respondent-appellant, and you are the petitioner-appellee, and the security required by law having been filed.

You are required, cited and admonished, to be and appear at a United States Circuit Court of Appeals for the Second Circuit, to be holden at the City of New York, in the State of New York, on the 14th day of January, 1905, to show cause, if any there be, why the said final order and decree mentioned in the order allowing said appeal, should not be corrected and why speedy justice should not be done in the premises.

Witness, Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 16th day of December, in the year of our Lord, one thousand nine hundred and four,
185 and of the Independence of the United States, the one hundred and twenty-eighth.

GEO. W. RAY,
United States District Judge.

(Endorsed:) In Bankruptcy, No. 1527.—United States District Court.—In the Matter of Jacob M. Mertens, *et al.*, Bankrupts.—Citation.—Original.—Wilson, Cobb & Ryan, Attorneys for Bankrupts, Office and P. O. address, No. 15 Third Nat'l Bank Bldg., Syracuse, N. Y.—Original.—U. S. District Court, N. D. of N. Y.—Filed Dec. 23, 1904.—W. S. Doolittle, Clerk.

Stipulation as to Record

In the United States District Court for the Northern District of New York.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts.

It is hereby stipulated and agreed that the certified tran-
186 script of record herein to be sent to the Clerk of the United States Circuit Court of Appeals, in and for the Second Circuit, shall consist of the following records and papers:

1. The petition of the trustee and notice of motion to compel the assignment of policies.
2. The answer to the petition.
3. The order referring the controversy to a Special Master to take evidence and report.
4. The testimony taken before the Special Master.
5. The exhibits introduced in evidence in accordance with a stipulation now on file.
6. The findings, opinion and report of the Special Master.
7. The exceptions to the report.
8. The opinion of Judge Ray confirming the report of Special Master.
9. The order of the United States District Court directing the transfer of insurance policies.

10. The petition to the Circuit Court of Appeals for the Second Circuit for a revision and stipulations and papers on file pertaining thereto.

11. The notice of appeal to the Circuit Court of Appeals for the Second Circuit; assignment of errors; petition and allowance
187 of appeal; undertaking; citation; stipulations and papers pertaining to said appeal.

Dated December 17, 1904.

LEWIS & CROWLEY,
Solicitors for Respondent.
WILSON, COBB & RYAN,
Solicitors for Appellant.

(Endorsed:) Stipulation as to Record.—Filed Dec. 23, 1904.—W. S. Doolittle Clerk.

UNITED STATES OF AMERICA, *Northern District of New York, ss:*

I, William S. Doolittle, Clerk of the District Court of the United States of America, for the Northern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 199 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the matter of Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens and Edmund A. Mertens, individually and as composing the co-partnership firm of "J. M. Mertens & Co.," Bankrupts, as the same remain of record and on file in said office and have been stipulated by and between the solicitors for the respective parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of Utica, in the Northern District of New York, in the Second Circuit, this twenty-eighth day of December, in the year of our Lord, one thousand nine hundred and four, and of the Independence of the United States, the one hundred and twenty-ninth.

W. S. DOOLITTLE, *Clerk.*

188 United States Circuit Court of Appeals for the Second Circuit.

Nos. 14 and 30.—October Term, 1905.

Argued October 25, 1905; Decided November 28, 1905.

In the Matter of JACOB M. MERTENS ET AL., Bankrupts.

JACOB M. MERTENS, Petitioner and Appellant,

Appeal from the District Court of the United States for the Northern District of New York.

Before Judges Lacombe, Townsend, and Coxe.

This cause comes here and upon petition to review an order of the District Court, Northern District of New York, confirming a

report of a Special Master, overruling exceptions to the same and adjudging that certain policies of insurance upon the life of Jacob M. Mertens (one of the members of the bankrupt firm of "J. M. Mertens & Co.") and all the rights, title and interest of said Mertens in and to said policies, and the rights, powers and property represented thereby have passed to and are the property of the trustee in bankruptcy and now are and remain in him. The order directed Mertens upon demand to execute and deliver all assignments, releases and other papers necessary to constitute proper vouchers in protection of the insurance company, etc.

Besides the petition to review under Sec. 24*b* of the Act, an appeal was taken, upon the theory that the controversy here presented is one "arising in bankruptcy proceedings," and within the provisions of Sec. 24*a*. The opinion of the District Judge is reported in F. R.

189 *Per Curiam.*—In conformity with the views expressed by the Supreme Court in First Nat. Bank *v.* Chicago Title & Trust Co. (198 U. S., 288) the appeal must be dismissed, since the order sought to be reviewed was a mere step in bankruptcy proceedings proper and no controversy arising out of the settlement of the bankrupt's estate of the sort presented in Hewit *v.* Berlin Machine Works (194 U. S., 296) was disposed of by the action of the Court below. The jurisdiction of this Court is confined, in cases like the present, to revision in matter of law on due notice and petition under Sec. 24*b*.

Section 70 of the Bankruptcy Act provides as follows:—

"(*a*) The trustee of the estate of a bankrupt upon his appointment and qualification, and his successor or successors, if he should have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, excepting so far as it is to property exempt, to all, * * * (3) Powers which he might have exercised for his own benefit, * * * , (5) Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him * * *: Provided, that when any bankrupt shall have an insurance policy which has a cash surrender value, payable to himself, his estate or personal representatives, he may within thirty days after the cash surrender value has been ascertained and stated to the trustee by the Company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry said policy, free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

At the time Mertens was adjudged a bankrupt he held three tontine policies in the Equitable Life Assurance Society.

190 By each his life was insured for a certain sum, payable to the insured, his executors, administrators and assigns within sixty days after proof of death, and each policy provided that at the expiration of twenty years from its date the insured, if living,

shall have the choice of exercising one of several options; and in each case one of these options is the cancellation of the policy in consideration of a sum of money, which includes not only a fixed sum, but also a part of the earnings of the policy, which earnings are not ascertainable until the end of the tontine period.

The policies did not give him the right to a cash surrender value at his option, in advance of the expiration of the tontine period; but did provide that within six months after the policy shall be in default for non payment of a premium, upon application accompanied by the surrender of the policy, another and a paid-up policy shall be issued upon the purchase power of the amount of the reserve alone, accumulated at the time of the default, against the strictly insurance feature of the policy. Evidence was given before the special master, who reports that it appears therefrom that upon the surrender of such tontine policy it has been the practice of the insurance company to pay upon the request of the assured a sum in each case equal to the then cash value of the paid-up policy.

The interest of the insured in the policies would pass under the provisions of Section 70*a*. for it is property which prior to the filing of the petition he could have transferred; indeed he had already transferred each of them as collateral to loans which he had obtained from a bank.

The only question is whether the policies are within the proviso, so that the bankrupt may upon paying or securing to the trustee the cash surrender value continue to hold, own and carry such policy free from the claims of his creditors.

It will not be necessary to review the numerous and somewhat conflicting decisions which are marshalled on the briefs. The Circuit Court of Appeals for the Seventh Circuit had the
191 same question before it on policies identical in their provision and on evidence showing that there was an actual specific sum of money which the insurer was willing to pay in cash for a surrender. That Court held:

"This policy does not fall within the proviso. The term 'cash surrender value,' therein employed, has a definite and legal meaning, namely, the cash value—ascertainable by known rules—of a contract of insurance abandoned and given up for cancellation to the insurer by the owner, *having contract right to do so.* The proviso does not include those policies where the right to surrender is not given by contract. In the present case, failing provision in the policy to that end, surrender could only be accomplished through agreement with the company." *In re* Welling (113 F. R., 189).

We should be inclined to concur with these views and to sustain the conclusion of the District Judge in the cause at bar that "no policy is understood to have a cash surrender value unless provided for in the policy so as to be enforceable by the insured"—were it not for a subsequent expression of opinion by the Supreme Court. This is found in Holden *v.* Stratton (198 U. S., 214) as follows:

"There has been some contrariety of opinion expressed by the Lower Federal Courts as to the exact meaning of the words 'cash surrender value' as employed in the proviso, some courts holding

that it means a surrender value expressly stipulated by the contract of insurance to be paid, and other courts holding that the words embrace policies, even though a stipulation in respect to surrender value is not contained therein, where the policy possesses a cash value which would be recognized and paid by the insurer on the surrender of the policy. It is to be observed that this latter construction harmonizes with the practice under the bankrupt act of 1867, *In re* Newlands (6 Ben., 342); *In re* McKinney (15 Fed Rep.,
192 535), and tends to elucidate and carry out the purpose contemplated by the proviso as we have construed it. However, whatever influence that construction may have, as the question is not necessarily here involved, we do not expressly decide it."

Although this is manifestly obiter to the questions decided in Holden *v.* Stratton, it is such an explicit declaration of the views of the Court upon the question raised here that we should hesitate to disragard it, and therefore have concluded to reverse the order under review and remand the cause with instructions to give the bankrupt an opportunity to pay and secure the actual value which would be paid on surrender according to the uniform practice of the company. By such a disposition of the cause the decisions in the two circuits will not be uniform and, although there is no appeal, our action upon petition to review may be reviewed on certiorari.

Order reversed and cause remanded with instructions, as above.

D. R. Cobb, for the Petitioner.

W. B. Crowley, for the Respondent.

193 At a stated term of the United States Circuit Court of Appeals for the Second Circuit, held at the United States Court House in the Court House Building, in the City of New York in the Southern District of New York, on the 9th day of December, 1905.

Present: Hon. E. Henry Lacombe, Judge; Hon. William K. Townsend, Judge; Hon. Alfred C. Coxe, Judge.

In the Matter of JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, and EDMUND A. MERTENS, Individually and as Composing the Co-partnership Form of "J. M. Mertens & Co.," Bankrupts. JACOB M. MERTENS, Petitioner-Appellant.

This cause having come on to be heard on the 24th day of October, 1905, upon a petition to review an order and decree of the United States District Court for the Northern District of New York, granted on the 6th day of September, 1904, and filed and entered September 8, 1904, which confirmed the report of Hon. Charles L. Stone, Special Master, directing the petitioner to assign certain policies of insurance upon his life to the trustee in bankruptcy of his estate. Also upon an appeal from the aforesaid order and decree and said appeal having been dismissed for want of jurisdiction on the part of the Court to hear the same, Now, Therefore, on motion of Dorr Raymond Cobb, Solicitor and Counsel for the said petitioner, Jacob M. Mertens, it is

Ordered, adjudged and decreed and the Court doth hereby order adjudge and decree as follows:—

1. That the prayer of the said petitioner, Jacob M. Mertens be granted and that said order and decree of the District Court of the United States for the Northern District of New York be and
194 the same hereby is in all things reversed, with costs in this Court to said petitioner, Jacob M. Mertens.

2. That the Clerk of the Court be and he hereby is directed to issue to the said District Court of the United States for the Northern District of New York *and* mandate of this Court, remanding this cause to that Court, with instructions to give the said petitioner, Jacob M. Mertens, an opportunity to pay and secure to the trustee in bankruptcy of his estate the actual value which would have been paid by said insurer according to its uniform practice upon the surrender of the said policies of life insurance.

E. H. L.
W. K. T.
A. C. C.

O. K.
LEWIS & CROWLEY,
Attorneys for Appellee.

O. K.
D. RAYMOND COBB,
Att'y for Petitioner-Appellant.

Endorsed: U. S. Circuit Court of Appeals, Second Circuit. In the Matter of Jacob M. Mertens *et al.*, Bankrupts. Decree. Wilson, Cobb & Ryan, attorneys for petitioner. Office and P. O. Address No. 15 Third Nat'l Bank Bldg., Syracuse, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 11, 1905. William Parkin, Clerk.

195 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 194 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of *In re* Jacob M. Mertens *et al.*, Bankrupts, Petitioners, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 14th day of December in the year of our Lord One Thousand Nine Hundred and five and of the Independence of the said United States the One Hundred and thirtieth.

[Seal United States Circuit Court of Appeals.]

WM. PARKIN, *Clerk.*

196 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Jacob M. Mertens is appellant and petitioner, and Albert K. Hiscock, Trustee in bankruptcy of the estate of Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens, and Edmund A. Mertens, individually and as composing the copartnership firm of J. M. Mertens & Co., bankrupts, is appellee and respondent, which suit was removed into said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Northern District of New York, and wherein there was also filed in said Circuit Court of Appeals a petition for review by said Jacob M. Mertens, and, we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

197 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of March, in the year of our Lord one thousand nine hundred — six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

198 [Endorsed:] File No. 20,104. Supreme Court of the United States. No. 602, October Term, 1905. Albert K. Hiscock, Trustee &c., *vs.* Jacob M. Mertens. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 10, 1906. William Parkin, Clerk.

199 In the Supreme Court of the United States.

ALBERT K. HISCOCK, Trustee in Bankruptcy of Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens, and Edmund A. Mertens, Individually and as Composing the Co-partnership Firm of "J. M. Mertens & Co.," Bankrupts, Petitioner,

vs.

JACOB M. MERTENS, Respondent.

It is hereby stipulated, agreed and consented that the transcript of record and proceedings in this cause in the United States Circuit Court of Appeals for the Second Circuit, which was certified by the Clerk of said Circuit Court of Appeals on the 14th day of December, 1905, and which is now on file with the Clerk of said Supreme Court

of the United States, having been so filed for use upon the application for a writ of certiorari herein, may be taken, used and considered as a full and complete return by said United States Circuit Court of Appeals for the Second Circuit to the writ of certiorari issued by said Supreme Court to said Circuit Court of Appeals herein and dated March 6, 1906.

Dated, March 9, 1906.

WILL B. CROWLEY,
Counsel for Albert K. Hiscock, Trustee, Petitioner.
DON RAYMONND COBB,
Counsel for Jacob M. Mertens, Respondent.

200 Endorsed: Supreme Court of the United States. Albert K. Hiscock, as Trustee, &c., Petitioner, *vs.* Jacob M. Mertens, Respondent. Stipulation as to return to writ of certiorari. Will B. Crowley, Attorney for Petitioner. Office and post office address, 20 White Memorial Building, Syracuse, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 10, 1906. William Parkin, Clerk.

201 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having been lately certified and filed in the office of the Clerk of the said Suprme Court of the United States, a copy of the stipulation of counsel is hereto annexed and by direction of counsel for the petitioner, said stipulation is hereby certified as the return to the writ of certiorari issued herein.

Dated New York, March 10th, 1906.

[Seal United States Circuit Court of Appeals.]

WM. PARKIN
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

202 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Matter of Jacob M. Mertens *et al.* Return to Certiorari. Office of the Clerk Supreme Court U. S. Received Mar- 19 1906.

203 [Endorsed:] File No. 20,104. Supreme Court U. S. October Term, 1905. Term No. 602. Albert K. Hiscock, Trustee &c., Petitioner, *vs.* Jacob M. Mertens. Writ of Certiorari and return. Filed Mar. 19", 1906.

No. [redacted].209

Office Supreme Court U. S.
FILED
FEB 23 1906
JAMES H. McKENNEY,
Clerk

In the

SUPREME COURT OF THE UNITED STATES.

ALBERT K. HISCOCK, Trustee in Bankruptcy of JACOB M. MERTENS, *et al.*,

Petitioner,

vs.

JACOB M. MERTENS,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

J. P. Fralick, Law Case Printer, 100 Wieting Blk.
Syracuse, N. Y.

In the

SUPREME COURT OF THE UNITED STATES.

ALBERT K. HISCOCK, TRUSTEE IN BANKRUPTCY OF JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS AND EDMUND A. MERTENS, INDIVIDUALLY AND AS COMPOSING THE CO-PARTNERSHIP FIRM OF "J. M. MERTENS & Co.," BANKRUPTS,

Petitioner,

vs.

JACOB M. MERTENS,

Respondent.

Petition for writ of certiorari to the United States Circuit Court of Appeals, for the Second Circuit, requiring it to certify to the Supreme Court of the United States for its revision and determination the petition for review in bankruptcy taken by said Jacob M. Mertens against Albert K. Hiscock, as trustee in bankruptcy of said Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens and Edmund A. Mertens, individually and as composing the co-partnership firm of "J. M. Mertens & Co.,"

bankrupts, In the Matter of Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens and Edmund A. Mertens, individually and as composing the co-partnership firm of "J. M. Mertens & Co.," bankrupts, lately depending in said Circuit Court of Appeals.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Albert K. Hiscock, trustee in bankruptcy of Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens and Edmund A. Mertens, individually and as composing the co-partnership firm of "J. M. Mertens & Co.," bankrupts, filed under the provisions of Section 25-d of the Bankruptcy Act of 1898, respectfully represents as follows:—

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A review of the decision below is asked in brief, because:

1. Said decision by the Second Circuit is absolutely contrary to the decision of the same question by the Seventh Circuit.

2. As shown by its opinion, the Court below was not satisfied that its decision was just or correct, and in effect asked this Court to review.

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3. The Supreme Court has not decided the question.

4. The same question arises in many bankruptcy proceedings, and is of great importance to the creditors of bankrupts generally and also to bankrupts themselves.

To substantiate the grounds briefly set forth above, the petitioner represents:

A reference to the opinions of the Special Master (R. p. 132), the District Court for the Northern District of New York (R. p. 152), and the Circuit Court of Appeals for the Second Circuit (R. p. 193), will show conclusively that the ruling of the latter Court should be reviewed. 7

This cause involves a question entirely novel and one of the most vital importance arising under the Act of 1898—a question which will arise in many bankruptcy proceedings and upon the decision of which will depend the ownership of a vast number of so-called life insurance policies, to wit, policies of the tontine or semi-tontine variety, which policies are very common and which are held by debtors to great amounts in different parts of the United States, and which are of great value. The question to be determined is as to whether such so-called tontine life insurance policies, which not only by their terms fail to provide for a cash surrender value, but which also have, because of their peculiar "tontine" nature, a large actual value, a value much greater than can be obtained from the insurance company issuing the same, come within the provise of Section 70-a-5 of said Bankruptcy Act. Said section is printed at page 194 of the Record. 8

At the time of the filing of the petition in bankruptcy herein, August 18, 1903, Jacob M. Mertens was the owner of four so-called insurance policies, all of the tontine variety, all issued by the Equitable Life Assurance Society of New York. In one of them it is admitted that the trustee has no interest, (R. Fol. 400) and 9

consequently it will not be spoken of again. Of the three other policies aggregating in amount $90,000, all in case of death were payable to Mr. Mertens' estate, and in case he continued to live, the options of which we shall here-
10 after speak and which are of great importance to a consideration of the question involved, were in favor of him alone. The expiration of the tontine period, meaning thereby the time when the option became enforceable by the insured, was in each case twenty years from the date of the policy. The policies appear in the Record at pages 77, 85 and 93. One policy, No.274,445, was issued March 8, 1884, in the amount of $20,000 with a semi-annual premium of $293; another, No. 415,768, was issued January 23, 1889, in the amount of $20,000, with an annual premium of $684; the other, No.
11 417,171, was issued February 15, 1889, in the amount of $50,000, with a semi-annual premium of $791.50.

It will be noted that these policies are *"tontine"* policies. The peculiar nature of a tontine policy is hereafter discussed and is of vital consequence to a proper consideration of the issue.

After the adjudication, it appeared that Mr. Mertens, the bankrupt, claimed that these policies were embraced within the proviso contained in Section 70-a-5 of the Bankruptcy Act, and that he claimed to be entitled to
12 hold the same free from all claims of creditors upon paying to the trustee the amount of what he alleged was the cash surrender value thereof. Thereupon the trustee presented a petition to the District Court (R. p. 17) upon notice (R.p.15) claiming that the bankrupt had on right nor interest in said policies, asking for an order requir-

ing said Mertens to execute and deliver to the trustee an assignment of said policies and also asking that the rights of said bankrupt and of said trustee therein be fixed. The bankrupt filed an answer to said petition (R. p. 28) claiming both that the trustee had no interest whatever in said policies and also that the same had a cash surrender value, upon payment of which he was entitled to hold the same free from the claims of creditors. Thereupon an order was made (R. p. 35) for the taking of the evidence and proof before a Special Master, he to report the same with his findings and conclusions, which he did, finding in favor of the trustee (R. p. 132). Said findings were confirmed by the District Court (R. p. 162, Opinion p. 152).

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The issue which was raised by said petition and answer was, in short:—Did said policies, which had no cash surrender value by their terms, come within the proviso of Section 70—a—5? The trustee, on the one hand claimed that the policies were not within the proviso, also asserting that they had a large actual value, much greater than the insurance company would pay, and that under some of the provisions of the policies, they were not life insurance policies at all, but investments. The bankrupt, on the other hand, claimed that the policies were within the proviso, because the insurance company was willing to give a certain sum in cash for the surrender of the same, although not provided for by the terms of the policies, the sum being fixed according to a definite custom adopted by it. He also asserted that the trustee had no interest whatever in policies which by their terms did not provide for a cash surrender value.

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The above procedure for the determination of the

question at issue was adopted with the consent of both parties, as being the most summary and effective way of determining the question.

16 The bankrupt's claim that the policies, having no cash surrender value by their terms, did not pass to the trustee is not only inconsistent with his other claim above mentioned but cannot be substantiated because there never has been any case in which such a rule has been laid down where the policy had any value for any purpose, and he proved in this case by his own witness that the policies did have a large actual value. The Welling and Slingluff cases (*see post*) are also authorities on the proposition that the policies did pass to the trustee notwithstanding that they had no cash surrender value by their terms, and the Court below held with the trustee on this 17 proposition. (R. p. 195).

Upon the hearing before the Special Master, there were offered in evidence the policies in question which appear in the Record (pages 77-93. A reference to those exhibits will show on their face that they provide, respectively, for a straight insurance upon the life of Mr. Mertens and that in case of lapse no surrender value will be given, except by way of a paid-up policy, which will be "without participation in profits" (R. Fols. 233, 402). It will also be noted that on the back of the policies are a 18 number of endorsements and that by the endorsement No. 5 (R. Fol. 239) it is provided that if the insured shall survive the tontine period, i. e., twenty years, he may then exercise one of several options. Among those options it is provided that the insured may then take out a paid-up policy for an amount, or may withdraw in

cash a sum, which under each policy is made up as follows: First, a definite sum mentioned in the option, and second, in addition thereto, the surplus apportioned by the Society to said policy.

Upon the hearing, the bankrupt swore Mr. George E. Brainard, an agent of the Insurance Company, as an expert, and from his testimony (R. p. 45, et seq.), it appeared that the Company had made it a practice under this form of policy to pay the insured money for a surrender; that is, that the Company which was only obligated under the terms of the policy to issue to the one surrendering the policy a paid-up policy, which was without participation in profits, had made it a practice to determine the value which this substituted paid-up policy would have, and to pay that value to the insured upon surrender of the tontine policy. In other words, the Company simply avoided the extra work of issuing the paid-up policy in strict accordance with the terms of the tontine policy, which paid-up policy the insured could then surrender, by paying the insured directly the value of such a substituted paid-up policy without issuing it at all; but even this privilege could be obtained only in case the policy had lapsed (R. Fol. 144), *and in so surrendering the policy the holder would lose all rights in the profits,* whereas, if he continued to the end of the twenty year tontine period he would obtain those profits. The latter right is a very valuable element of the insurance. The bankrupt claimed that this practice of the Company gave to the policies in question such a cash surrender value, although not mentioned in the policies themselves, as would bring them within the proviso of Section 70.

On cross-examination by the trustee, however, it was shown by this witness that such a policy had an actual value much greater than the amount which the Company would so pay for it (R. Fol. 180, et seq.). As an in-
22 stance, take the case of the policy No. 274,445, Record, page 77. The amount which the Company, at the time of the bankruptcy, August 18, 1903, would give for this policy was only $5905.65. This is the sum which the bankrupt alleges is its cash surrender value, and on payment of which he claims to be entitled to the policy. But by the simple payment of the premium of $293, which was made by the Receiver in Bankruptcy on September 8, 1903, this policy was carried to the end of its tontine period which happened six months later, on March 8, 1904, and it then became worth the sum of $11,318.40,
23 said latter sum being made up of the $6046.40 mentioned in its option, No. 5, plus $5272. which was the surplus apportioned to the policy by the Company, said surplus being the money equivalent of its right to participate in profits. *Hence, the payment by the receiver of $293. and a holding on for about six months has added to the value of that one policy $5412.75, a sum that either goes to the estate for creditors, or to the bankrupt.* If the decision below stands, the bankrupt makes this vast profit. Consequently, as testified by the witness, it was evident that this policy had at the time of the bank-
24 ruptcy a much larger actual value than the $5905.65 which the Company would give for the paid-up policy which the Company was obliged to issue in case the tontine policy in question lapsed; and the witness also testified that there was a ready market for such securities (Fol. 182). What is said of the foregoing policy is

true of all the others, except that it is a more striking example on account of the fact that the tontine period was nearer completion at the time of the bankruptcy.

It is evident, therefore, that the contention of the bankrupt, as sustained by the Court below, would secure the 25
policy to the bankrupt for $5905.35, enabling him in six months, by the payment of $293, to make the large additional profit of $5412.75 at the expense of the creditors; because the $5412.75 is the avails of the right to participate in profits, a vested right owned by the bankrupt at the time of the bankruptcy, and conditioned only upon carrying the policy to the end of the tontine period. It is also evident that the nature of the tontine policy is such that the premium which is paid each year is really paid for two purposes. Part is paid for the straight insurance, provided for by the face of the policy, payable 26
in case the insured dies; the other part is a contribution to a fund which is made up from premiums obtained from policies of the same class, which fund accumulates until the end of the tontine period of twenty years; but if the holder of any policy in that class surrenders the policy prior to the end of the twenty years, he loses all right to participate in the fund, and the fund at the end of the twenty years is divided among the policy holders who continue their policies until that time. (R. Fols. 407, et seq.). The trustee contended that the above right 27
accruing at the end of twenty years was to all intents and purposes not insurance, but really an investment.

The Special Master and the District Court having held with the trustee in all of the foregoing contentions, the bankrupt thereupon filed an appeal and also a petition for review to the Circuit Court of Appeals for the Second

Circuit; thereafter the case was argued and the Circuit Court determined that it had no jurisdiction to hear the appeal and dismissed the same, but upon the petition for review, reversed the order of the District Court in an opinion which appears in the Record at page 193.

In its opinion, at page 196, the Circuit Court refers to the case of in re Welling, 113 Fed. Rep., 189, and it says:

> "The Circuit Court of Appeals for the "Seventh Circuit had the same questions before "it on policies identical in their provisions and "on evidence showing that there was an actual "specific sum of money which the insurer was "willing to pay in cash for its surrender," and then says that it, the Second Circuit, would be "inclined to concur with these views and to sus- "tain the conclusion of the District Judge in "the cause at bar" * * * "were it not "for a subsequent expression of opinion by the "Supreme Court. This is found in Holden "vs. Stratton, 198 U. S., 214." The opinion of the Circuit Court then quotes the opinion of the Supreme Court referred to and continues:
>
> "Although this is manifestly obiter to the "questions decided in Holden vs. Stratton, it "is such an explicit declaration of the views "of the Court upon the question raised here "that we should hesitate to disregard it, and "therefore have concluded to reverse the order "under review and remand the cause with in- "structions to give the bankrupt an oppor-

"tunity to pay and secure the actual value "which would be paid on surrender according "to the uniform practice of the Company. *By "such a disposition of the cause the decisions "in the two circuits will not be uniform and, "although there is no appeal, our action upon "petition to review may be reviewed on cer- "tiorari.*" (Italics are ours.)

Returning to the grounds on which this application for review is made, as set forth at the opening of this petition, petitioner now alleges that it is indisputably evident that the decision by the Second Circuit is absolutely contrary to the decision of the identical question upon policies exactly similar by the Seventh Circuit as set down in the case in re Welling, 113 Fed. Rep., 189, and the strange condition exists of the inhabitants of the Second Circuit of the United States being governed by a rule of law which is directly contrary to the rule of law governing the inhabitants of the Seventh Circuit, although both of those rules of law are simply the interpretation of the same Federal Statute, Section 70 of the Bankruptcy Act of 1898. Said rule is also contrary to the rule laid down in the case of in re Slingluff, 106 Fed. Rep., 154, Maryland District Court.

It is also undoubtedly true, as shown by its opinion, above quoted, that the Circuit Court of Appeals itself considered the rule laid down in the case of in re Welling, supra, to be the correct rule, and that it desires the decision in question to be reviewed by the Supreme Court.

It is also indisputably true that the Supreme Court

has not decided the question. The case of Holden vs. Stratton, 198 U. S., 214, upon which the order of reversal was based, was clearly not intended by the Supreme Court to be a precedent upon the matter in controversy, because the Supreme Court in that part of its opinion quoted by the Circuit Court of Appeals, at page 197 of the Record, itself so stated, as follows: "However, "whatever influence that construction may have, as the "question is not necessarily here involved, we do not ex- "pressly decide it." The Supreme Court thereby held that such expression was merely obiter and the Circuit Court of Appeals, although following it, said that it "is manifestly obiter." That case of Holden vs. Stratton involved simply the construction of Section 6 of the Bankruptcy Act, the question being as to whether property exempt under a State statute was also exempt under said Section 6 of the Bankruptcy Act, the property involved being a life insurance policy similar to the one in the case at bar. But it is evident that the construction of Section 70, which is the question in the case at bar, was not involved in the case of Holden vs. Stratton, and it is also evident that the peculiar nature of a tontine policy was not brought out, elucidated and discussed before the Supreme Court in that case.

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It is to review the ruling of the Circuit Court of Appeals of the Second Circuit on this question that a writ of certiorari is applied for and the question is of paramount importance, involving, as it does, a very common form of policy and because of the conflicting decisions in the several circuits, and in so applying this petitioner claims that the Circuit Court of Appeals erred in holding:—

36

First, that the policies in question were embraced within the meaning of the proviso contained in Section 70-a-5 of the Bankruptcy Act.

Second, that the policies had a cash surrender value.

Third, that after the adjudication, the bankrupt had any interest whatever in the policies. 31

Fourth, that the trustee was not the absolute owner of said policies free and clear from all claims of the bankrupt.

Fifth, in refusing to affirm the order directing the bankrupt to execute an assignment of said policies to the trustee.

Sixth, in refusing to affirm in all respects the order made by the District Court.

And so it is that your petitioner contends that by reason of the decision in the case at bar and the others so cited, error was committed and that there is a contrariety of opinion and not a uniform administration of the bankruptcy act (as necessary as uniformity in the Act itself, required by Section 8, Subsection 4, Article 1, of the Constitution of the United States), as to the grave and important question, to wit, the rights of a trustee in bankruptcy in policies of the nature hereinbefore set forth, being policies of insurance so-called, which do not provide for a cash surrender value and which are in fact partially investments and which have a much larger actual value than the company issuing the same will pay therefor. 32 33

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this

Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record in all proceedings in said Circuit
40 Court of Appeals in the case therein entitled, "In the Matter of Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens and Edmund A. Mertens, individually and as composing the co-partnership firm of 'J. M. Mertens & Co.', bankrupts," on the petition of Jacob M. Mertens for review, being No. 30 on the calendar of said court for the term beginning October, 1905, to the end that said case may be reviewed and determined by this Court as provided by law; and that the judgment of the said Circuit Court of Appeals and its decision and mandate in said case may be so modified and reversed as to deny the
41 petition for review filed by said Jacob M. Mertens to that Court in Bankruptcy and affirm the order and judgment of the District Court in the premises.

And your petitioner will ever pray.

ALBERT K. HISCOCK,
Trustee in Bankruptcy, &c.,
Petitioner.

WILL B. CROWLEY,
Of Counsel for Petitioner.

42

UNITED STATES OF AMERICA,
Northern District of New York, } ss:
County of Onondaga,

Will B. Crowley, being first duly sworn, deposes and says: That he is one of the counsel for Albert K. Hiscock, the trustee in bankruptcy of the estate of Jacob M. Mertens and the petitioner named in the foregoing petition; that he has read the same and knows its contents and that the facts therein stated are true to his own knowledge, except as to those matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

WILL B. CROWLEY.

Sworn to before me this 17th
day of January, 1906.
MEAD V. Z. BELDEN,
Notary Public,
Onon. Co., N. Y.

FILE COPY.

Office Supreme Court, U. S.
FILED.
JAN 11 1907
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

ALBERT K. HISCOCK, TRUSTEE IN BANKRUPTCY OF JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS AND EDMUND A. MERTENS, INDIVIDUALLY AND AS COMPOSING THE CO-PARTNERSHIP FIRM OF "J. M. MERTENS & CO.," BANKRUPTS, PETITIONER,

vs.

JACOB M. MERTENS.

No. 209.

BRIEF FOR PETITIONER.

THIS CASE COMES HERE UPON THE RETURN OF A WRIT OF CERTIORARI, DIRECTED BY THIS COURT TO THE CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT, FOR THE PURPOSE OF REVIEWING AN ORDER AND DECREE OF SAID COURT, MADE DECEMBER 9, 1905, WHICH ORDER AND DECREE REVERSED THE ORDER AND DECREE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK, MADE ON SEPTEMBER 6, 1904, BY THE HON. GEORGE W. RAY, DISTRICT JUDGE. THE ORDER AND DECREE OF THE DIS-

TRICT COURT CONFIRMED THE REPORT OF CHARLES L. STONE, SPECIAL MASTER, MADE JUNE 7, 1904, WHICH REPORT FOUND THAT THREE LIFE INSURANCE POLICIES OF THE SEMI-TONTINE KIND IN THE AMOUNT OF $90,000, ISSUED BY THE EQUITABLE LIFE ASSURANCE SOCIETY UPON THE LIFE OF JACOB M. MERTENS, ONE OF THE BANKRUPTS, PASSED ABSOLUTELY BY VIRTUE OF THE BANKRUPTCY PROCEEDING TO THE TRUSTEE IN BANKRUPTCY, AND THAT SAID BANKRUPT HAD NO RIGHT, BY PAYING TO THE TRUSTEE A SUM WHICH WAS CLAIMED TO BE THE CASH SURRENDER VALUE THEREOF, TO TAKE AND HOLD SAID POLICIES FREE FROM THE CLAIMS OF CREDITORS. IN SHORT, THE DISTRICT COURT HELD THAT THESE POLICIES DID NOT COME WITHIN THE "PROVISO" OF SECTION 70-A-5, OF THE BANKRUPTCY ACT; THE CIRCUIT COURT OF APPEALS HELD THAT THEY DID.

STATEMENT OF CASE.

An involuntary petition in bankruptcy, based upon an admission of insolvency, was filed against Jacob M. Mertens and his sons individually and as composing the copartnership of J. M. Mertens & Co., on August 18, 1903, and an order was thereupon made on that day, appointing Albert K. Hiscock, of Syracuse, N. Y., receiver of the estates of said alleged bankrupts; on September 15, 1903, the proceeding culminated in an adjudication in bankruptcy against said Jacob M. Mertens and his sons, and on October 14, 1903, the said receiver, Albert K. Hiscock, was duly elected trustee of the estates of said

bankrupts, thereby succeeding as trustee to the rights which he had held as receiver. (Page 20.)

At the time of the filing of said involuntary petition in bankruptcy, Jacob M. Mertens held four policies of life insurance, all issued by The Equitable Life Assurance Society upon his life; of these policies three aggregating in amount $90,000, were each, in case of death, payable to Mr. Mertens' estate and the options, if he continued to live, were in favor of him alone; the tontine period provided for by each was twenty years; one was a semi-tontine policy, issued March 8, 1884, in the amount of $20,000 with a semi-annual premium of $293 and numbered 274,445. (Page 42.) Another was a free tontine policy, issued January 23, 1889, in the amount of $20,000, with an annual premium of $684 and numbered 415,768. (Page 47.) The other was a free tontine policy, issued February 15, 1889, in the amount of $50,000, with a semi-annual premium of $791.50 and numbered 417,171. (Page 51.) Prior to the beginning of the bankruptcy proceeding, the tontine period in the fourth policy had expired and it had thereupon been converted into a paid-up policy, payable to Mrs. Mertens. On account of its having been pledged as collateral, the trustee has no pecuniary interest in it and it may be eliminated from the discussion. (Page 74.)

At the time when the bankruptcy proceeding was instituted, these policies were all held by Jacob M. Mertens subject only to some claims against them which arose out of their having been assigned as collateral to loans. The

amount of these loans is set forth in the petition, (page 11) but they are immaterial to the question before the Court.

It will be noted that none of these policies have any cash surrender value provided by their terms (pages 75, 76); *also that all of these policies are "tontine" policies, that is, they are not life insurance policies only, but have a separate and distinct feature which makes them purely an investment* (see option No. 5 in each policy, pages 44, 48, 53), because each one specially provides by its terms that at the expiration of twenty years from its respective date, the insured, if living, shall have the choice of exercising one of several options; and in each case one of those options is the cancellation of the policy in consideration of a sum of money, which includes not only a fixed sum, but a part of the earnings of the policy, which earnings are not ascertainable until the end of the tontine period.

By reason of these options, the policies have a large actual value, which is much in excess of any amount which can be obtained from the company for their cancellation. For instance in the case of the Policy No. 274,445, Exhibit No. 5, the tontine period of which expired within six months from the adjudication in bankruptcy, the actual value above what the company would give was nearly $5500. (Page 33.)

The reason for this vast difference, as hereafter shown, is that from the very nature of these policies the company

is precluded until after the expiration of the tontine period from paying anything for the right of the holder of the policy to participate in profits, which right does not become absolute until the end of the tontine period. (Page 34.) For under the terms of these policies, those policy holders who keep up their premiums to the end of the period, share proportionately all profits which accrue because of lapses or defaults by others holding similar policies who fail to keep up their premiums for the twenty years. (Provision No. 4 in each policy.) On account of these facts, the trustee claims that it was not the intent of the proviso in §70 of the Bankruptcy Act to include policies of this class, and thereby give the bankrupt such valuable privileges while granting him immunity from his debts.

Some time after the bankruptcy proceedings and the appointment of the trustee, it developed that Jacob M. Mertens claimed that he still had an interest in these policies; therefore, a petition (page 8) was presented to the District Court, alleging that the trustee was the sole owner of these policies and praying that an order be issued by it, directed to Jacob M. Mertens, requiring him to assign said policies to the trustee, together with all of his claims therein, said order also to fix the rights and interests of the trustee in said policies. An answer to that petition (page 14) was filed by the bankrupt in which he set forth two inconsistent claims: First, that the policies never passed to the trustee and that the trustee has not and never had any interest whatever in

them. Second, that the policies have a cash surrender value within the meaning of the Bankruptcy Act, Section 70-a-5, and that upon payment of that cash surrender value to the trustee, he is entitled to take the policies free and clear from all further claim by the trustee or by creditors. Upon that petition and answer an order (page 18) was made by the District Court, referring the proceeding to Charles L. Stone, of Syracuse, N. Y., as Special Master, to hear the evidence and report to the Court the facts, with his opinion thereon.

Upon the hearing, the bankrupt called as a witness an insurance expert, Mr. Brainerd (page 23) for the purpose of showing that although the policies did not provide for any cash surrender value, still the Company would *voluntarily* pay a sum for the cancellation thereof, which sum the bankrupt claimed was in fact a cash surrender value and brought the policies within the terms of the proviso; but this witness on his cross-examination testified that the policies had a much larger actual value than the sum which the Company would pay for such a cancellation. (Page 33.)

During the pendency of the litigation, so that the policies might not become lapsed, an arrangement was made, whereby the trustee keeps up the premiums under an agreement that if the policies are finally found to belong to the bankrupt, then the sums so paid by the trustee with interest are to be a lien upon the policies. (Page 59.)

The case is illumined by a very full and able report by

the referee, which discusses the policies and their terms and which appears at page 73, and also by the opinion of the District Court, which appears at page 84. Both of these opinions hold that Mr. Mertens has no rights whatever in the policies, but that the same belong absolutely to the trustee; and an order and decree in conformity therewith was made by the District Court. (Page 90.)

The bankrupt thereupon filed with the Circuit Court of Appeals a petition for the review of that decision and also an appeal therefrom. The appeal was dismissed (page 103) but upon the petition for review the decree of the District Court was reversed. The Circuit Court of Appeals wrote an opinion which appears at page 102, a perusal of which will show that the Court was really in favor of affirming the decree of the District Court, but taking the peculiar ground that it was constrained to follow what appears to have been a chance remark of the Supreme Court in Holden vs. Stratton, 198 U. S., 214, which the Supreme Court itself at the time of making it said was *obiter,* the Circuit Court of Appeals reversed the decree against its own judgment and practically asked this Court to review the decision. (Page 105.)

Thereafter the trustee filed a petition for a writ of certiorari with this Court on February 23, 1906, which was granted. In that petition the errors of which he complained were that the Circuit Court of Appeals erred in holding:—

First, that the policies in question were embraced

within the meaning of the proviso contained in Section 70-a-5 of the Bankruptcy Act.

Second, that the policies had a cash surrender value.

Third, that after the adjudication, the bankrupt had any interest whatever in the policies.

Fourth, that the trustee was not the absolute owner of said policies free and clear from all claims of the bankrupt.

Fifth, in refusing to affirm the order directing the bankrupt to execute an assignment of said policies to the trustee.

Sixth, in refusing to affirm in all respects the order made by the District Court.

The question before the court, in short, is: Under Section 70-a-5 of the Bankruptcy Act, has the bankrupt any right or interest in policies of insurance, such as are described in the petition and commonly known as "tontine policies"?

POINT I. These policies are not strictly life insurance policies, but are investments. They have no cash surrender value within the meaning of the proviso in Section 70-a-5 of the Bankruptcy Act, and the bankrupt is not entitled to take them from the trustee upon the payment of what the bankrupt claims is the cash surrender value thereof.

Section 70-a-5 of the Bankruptcy Act, after providing for the transfer of title of assets from a bankrupt to the trustee, contains the following proviso:

"Provided, That when any bankrupt shall have any "insurance policy which has a cash surrender value pay- "able to himself, his estate, or personal representatives, "he may, within thirty days after the cash surrender "value has been ascertained and stated to the trustee by "the company issuing the same, pay or secure to the trus- "tee the sum so ascertained and stated, and continue to "hold, own, and carry such policy free from the claims "of the creditors participating in the distribution of his "estate under the bankruptcy proceedings, otherwise the "policy shall pass to the trustee as assets."

The construction of this proviso is necessary for the determination of this controversy and in construing it it is essential that the terms of the policies in question should be carefully examined.

As before stated, all of these policies, except policy No. 1, Exhibit 4, which has been eliminated from the case (page 74), were payable in case of death to Jacob

M. Mertens, his executors or assigns, and the investment feature by which certain options were received and made available at the end of twenty years from the respective dates of the policies were also available by and in favor of J. M. Mertens himself. (See policies, pages 42, 47, 51.) That is, all benefits and privileges under these policies, whether under the insurance feature or the investment feature, were unquestionably at the time of the bankruptcy the property of J. M. Mertens.

In this discussion, we may as well limit our investigation to policy No. 274,445, Exhibit No. 5, page 42, for inasmuch as it is a type of the others, whatever decision is applicable to it must be applicable also to the others. This policy was issued March 8, 1884. It is called a Semi-Tontine Policy. It insured the life of J. M. Mertens for $20,000, payable to "Jacob M. Mertens, his executors, administrators or assigns." The premium is payable semi-annually in the amount of $293.00.

It does not provide for any cash surrender value, but on the contrary it expressly declares (see endorsements, bottom page 46), "No dividend will be declared on this Policy until the 8th day of Mch., 1904." It also provides that in case premiums have been paid for at least three years, the Company, *in case the policy becomes void because of default in payment of premium, will issue a new paid-up policy.* (Page 43.)

It will be especially noted that such paid-up policy:—

1. *Will be without participation in profits*: That

is, in case such a surrender is made, all right to participation in profits will be lost. (Page 43.)

2. Such paid-up policy will be available only in case the policy is surrendered after (and within six months from the time when) a default has been made in the payment of premium. (Page 43.)

But aside from the life insurance features, this instrument constitutes an investment. It provides that the tontine period shall expire Mch. 8, 1904, and says expressly,

"3. That no dividend shall be allowed or paid upon this policy unless the person whose life is hereby assured shall survive the completion of its Tontine Dividend Period as aforesaid, and unless this policy shall then be in force." (Third provision, page 43.)

"4. *That all surplus or profits derived from such Policies on the Semi-Tontine Plan, as shall not be in force at the date of the completion of their respective Tontine Dividend Periods, shall be apportioned among such policies as shall complete their Tontine Dividend periods.*" (Fourth provision, page 43.)

It then provides by Section 5, page 44, four different options which are available at the end of the twenty-year period, provided J. M. Mertens be living, and each of these options is available to J. M. Mertens himself and the sums provided to be paid thereby are payable to Jacob M. Mertens.

It will be noted that:—

a. *The petition in bankruptcy* (involuntary in form) was presented to the Court and the order made appointing the receiver herein on *August 18, 1903,* the petition being filed with the Clerk at Utica on August 20, 1903. (Page 40.)

b. *The adjudication* in bankruptcy was made *September 15, 1903.* (Page 39.)

c. *On September 8, 1903, the receiver paid the last premium necessary to mature the policy to the end of the twenty-year or tontine period.* (Page 22.) *By that payment it became certain that the policy in question would:—*

1. *In case J. M. Mertens died between September 8, 1903, and March 8, 1904, be worth $20,000, the amount payable in case of his death.*

2. *In case he did not die the policy would be worth as much as the most favorable option was worth.* Under the first option specified in the policy, the Company agreed to pay at least $6046.40, plus the surplus apportioned to the policy (page 44), *which as hereafter shown would make a total of $11,318.40.* (Page 33.)

On the hearing before the referee, the bankrupt offered oral evidence as to the terms and conditions of these policies. (Page 23.) That testimony was given by Mr. Brainerd and it appears therefrom that the surplus which would be apportioned to the policy in question, would

amount to sufficient so that with the $6046.40, specified above, the total amount which the Company would pay, in case the first option were exercised on March 8, 1904, would be $11,318.40. (Page 33.) In other words, on March 8, 1904, Mr. Mertens had he not become bankrupt could have surrendered this policy and received from the Company $11,318.40 in cash. Mr. Brainerd further testified that the amount which the Company would have paid for a surrender thereof on September 8, 1903, in case the premium had not been paid on that day, and in case the policy had lapsed, would be only $5905.65. (Page 31.) *In other words, by the simple payment of $293.00 which the receiver made on this policy on September 8, 1093, it increased in value, so far as moneys obtainable from the Company were concerned, from $5905.65 to $11,318.40, it being necessary in order to obtain the larger sum to wait only the six months and to have Mr. Mertens live for that period.*

It appears from Mr. Brainerd's testimony that his Company never paid any money for the surrender of policies, except after a lapse in the payment of premium (page 29), and that according to his understanding, after such a policy had lapsed the amount which the Company had paid for the same was simply the *same amount that it would have paid if the insured had taken out a paid-up policy according to its terms and had then surrendered the paid-up policy.* (Pages 32, 33.) There is nothing in his testimony from which it is proved or the inference can be drawn that a policy holder had any right which he could legally enforce to compel the Com-

pany to pay a single cent for the surrender of the policy prior to the expiration of the tontine period.

On the contrary, he has testified that the actual value of this policy on September 8, 1903 (page 33), was more than the Company would have paid for it in case the premium due September 8, 1903, had not been paid; and at pages 35 and 37, he testified that the actual cash value of this policy in September, 1903, was not determinable because it could not be figured until the Company had completed the business of the year 1903, so as to determine the surplus.

He says in regard to the policy known as Policy No. 3, Exhibit 6, for which the Company had stated to him that in case of lapse it would pay for a surrender of the same $2272.56, that this same policy had an actual value of at least $5,000 (page 34); and in regard to Policy 4, Exhibit 7, the amount which the Company was willing to pay for a surrender in case of lapse, being $6574, Mr. Brainerd says it had an actual value of at least $12,000. (Page 34.)

He also testified that in case a policy was lapsed and the insured took the amount which the Company would pay for it, then the insured would lose all participation in profits. (Page 34.)

We also call the attention of the Court to the applications of Mr. Mertens made at the time when these policies were taken out, whereby he agreed to waive all claim

to any surrender value other than the paid-up policy provided for by the contract. (page 63.)

From the foregoing facts as shown by the policies themselves and also by the evidence of Mr. Brainerd, it is evident that the bankrupt is not entitled to any interest in these policies and cannot take them from the trustee. This question has never been before this Court, so all our citations are from lower courts; but the question has been expressly decided adversely to the claim of the bankrupt in the cases of

In re Welling, 113 Fed. Rep., 189, C. C. A., 7th Circ.

In re Slingluff, 106 Fed. Rep., 154.

These opinions are so exhaustive and complete, that it is impracticable to quote from them without giving the whole opinions, and we, therefore, refer to the reports with the single statement that these cases hold that the term "cash surrender value" in the Bankruptcy Act refers to a value in cash provided by the terms of the policy itself, and which can be demanded as a contract right by the insured; that it does not mean a sum which the company will voluntarily pay, although not obligated to do so.

In the Welling case, the form of the policy was exactly like the policy here and was issued by the same Company; the only difference was that in that case the insurance was payable to the wife, but in the case at bar the insurance was payable to the estate of the bankrupt; so

that this case is stripped of the complications which arose in the Welling case, because the wife had an interest in that policy, and it will be noticed that the dissenting Judge in the Welling case dissented only because of the wife's interest and was with the majority of the Court upon all the propositions necessary to decide this case here in favor of the trustee.

Although the above cases are clearly directly in point, we submit the following reasons as having some additional bearing upon the questions at issue:

It is not claimed that the policies have by their terms any cash surrender value. On the contrary, that these policies have no cash surrender value by their terms is shown

1. By the endorsement on the cover of the policy: "No dividend will be declared on this Policy until the "8th day of Mch., 1904." (Page 46.)

2. By the third clause of the provisions of the policy: "That no dividend shall be allowed or paid upon this "Policy unless the person whose life is hereby assured "shall survive the completion of its Tontine Dividend "Period as aforesaid, and unless this policy shall then be "in force." (Page 43.)

3. By the fourth clause of said provisions: "That "all surplus or profits derived from such Policies on the "semi-tontine plan, as shall not be in force at the date of "the completion of their respective Tontine Dividend "Periods, shall be apportioned among such Policies as

"shall complete their Tontine Dividend Periods." (Page 43.)

4. By the written applications of Jacob M. Mertens. For example, clause 11 thereof (page 64), which provides that "all right or claim to temporary assurance or "any other surrender value than that provided in the "Policy, shall be specifically waived and relinquished, "whether required by the statute of any State or not."

5. By the definition of the word "tontine" itself, which is given in the Century Dictionary as "Tontine "Policy, a policy of insurance in which the policy holder "agrees, in common with the other policy holders under "the same plan, that no dividend, return premium, or sur-"render value shall be received for a term of years called "the tontine period, the entire surplus from all sources "being allowed to accumulate to the end of that period, "and then divided among all who have maintained their "insurances in force."

Consequently, it is shown by the terms of these policies that they have no cash surrender value. As to the testimony of Mr. Brainerd, we claim:

First, this evidence is not competent to modify the policies under the general rule that oral testimony cannot modify or change a written instrument.

Second, the courts have already decided that "cash surrender value" contemplated by Section 70-a-5 of the Bankruptcy Act, is not a value which may be obtained by

means of negotiation or agreement, but that it is only such a value as can be demanded and legally enforced against an unwilling insurance company. This proposition is held in the Welling and Slingluff cases, above cited, and we also call the Court's attention upon this subject to the opinion in

Pulsiver vs. Hussey, 9 Am. Bank., 657; 97 Maine, 434.

In that case, which was in the Supreme Judicial Court of Maine, the Court held that the policy was covered by the exemptions provided for by the law of Maine and did not pass, but the Court in discussing the above subject holds squarely that the custom of the Company has no effect and is not embraced within the meaning of surrender value used in the Bankruptcy Act (see 9 Am. Bk. Rep., pages 668 and 669.) In that case, it was shown that the Company had a custom of recognizing a cash surrender value, even at times other than on the five year periods provided for in the contract.

Furthermore, even though the testimony of Mr. Brainerd were admissible, we claim that the bankrupt has not made out that these policies have a cash surrender value, because it appears from the evidence that the Company, even under the custom which the bankrupt claims to exist, would pay nothing unless the policies were lapsed. It is an indisputable fact that none of these policies were lapsed. If we look at them with reference to the date when the petition in bankruptcy was presented to the Court (August 18, 1903,) we find that none of the poli-

cies were in default, because the premium on Policy No. 1, Exhibit 4, had been paid to December 21, 1903; the premium on Policy No. 2, Exhibit 5, had been paid to September 8, 1903; the premium on Policy No. 3, Exhibit 6, had been paid to December 23, 1903, and the premium on Policy No. 4, Exhibit 7, had been paid to February 15, 1904, (pages 30, 31); consequently at the time when the petition was filed in August, Mr. Mertens could not have obtained any sum whatever from the Company. Between the date of presenting the petition and the date of the adjudication in bankruptcy, September 15, 1903, the receiver paid the premium on Policy No. 2, Exhibit 5. (Page 22.) If it be held that the title of the trustee relates back to the time of presenting the petition, then the policies were not lapsed; on the other hand, if it be held that the title to the trustee relates back only to the time of the adjudication, then none of the policies were lapsed; so that in any event Mr. Mertens could have received nothing from the Company, either on the date when the petition was presented, or on the date when he was adjudicated a bankrupt.

There is another proposition to be considered: It is the fact that clearly under the terms of the policy and as shown by the evidence of Mr. Brainerd (page 34) these policies, if surrendered, lose all right to participate in profits. What is the result? It is this: We have the bankrupt here claiming that he is entitled to take the policy, Exhibit 5, from the trustee upon paying to him the sum of $5905.65. What is that sum? It is simply the sum which the Company would pay if the policy had

lapsed and had been surrendered. (Page 33.) It does not include any item whatever for the right which this policy, which has not in fact lapsed and which has not been surrendered, has to participate in the profits. *The right to participate in the profits was a part and parcel of the policy and of the privileges enjoyed thereunder.* It was a distinct property right, which was vested in the holder of the policy at the time when the bankruptcy proceedings were begun, and in order to become a fixed right to a definite sum of money, all that was necessary was for it to be continued for a period of six months and for Mr. Mertens to continue living for that time. We take it that the vast amount of difference between the value of this policy, if lapsed on September 8, 1903, given as $5905.65 and its value on March 8, 1904, of $11,318.40, is chiefly made up by the value of this right to participate in profits. *It seems to us, therefore, absurd to claim that the Bankruptcy Law contemplated that such a valuable right, namely, the right to participate in profits, could be absolutely wiped out and taken away from the trustee in such a case as this, by allowing the bankrupt to take up the policy by paying what the bankrupt here claims to be the surrender value.*

It appears from the evidence of Mr. Brainerd (page 37), that the actual cash value of this policy was not determinable in September, 1903, and could not be determined until the Company's business for 1903 had been closed. It seems to us that in that fact lies conclusive proof that this policy did not have the cash surrender value contemplated by the statute, because it was impos-

sible to determine that value at the time of the bankruptcy and, consequently, the bankrupt could not pay it in to the trustee and take over the policy; that is, he could not pay an indeterminate sum.

In the Court below, the case was decided entirely upon the strength of the remark of the Supreme Court in Holden vs. Stratton, 198 U. S., 214. The question in that case was of exemption of a life insurance policy under the statute of Iowa, and it is quite clear that the part of the opinion which was followed is purely *obiter,* and the Supreme Court said that it did not intend to decide the question. Furthermore, the peculiar nature and qualities of a tontine policy were not developed and no such facts were brought to the Court's attention as the evidence in this case shows.

In the Court below the bankrupt made much of the cases of *In re* McKinney, 15 Fed. Rep., 535, and *In re* Coleman, 136 Fed. Rep., 818, and we anticipate he will do so here; but we are unable to see that the McKinney case is any authority for the bankrupt. A reading of the opinion will show that the Court gave to the trustee a sum equal to the highest actual value that could be attributed to the policy at the time of the adjudication, and the part which was refused to the trustee was simply the value which was created by the payment of premiums by the widow after the adjudication. To us the case seems to hold only that property acquired after the adjudication is not assets, which is a proposition well established and one with which we have no dispute. As to the claim that the trustee could not continue to pay the premiums, we

refer to that part of Judge Ray's opinion, which appears at page 89. So far as we can observe, the only rule which has been established by the Courts in any cases cited by the bankrupt below, is that the policies are assets in the hands of the trustee and that he is to get from them, by whatever method is most available, the greatest amount of money which they are capable of producing.

Moreover, the McKinney and Coleman cases did not arise in reference to a tontine policy; in the Boardman case (also cited by the bankrupt in the Court below) the trustee, without controversy, agreed to the position which the bankrupt takes in this case; Warnock vs. Davis, also cited by the bankrupt, has no applicability to policies such as these where they are investments, and the case is no authority for claiming that a trustee in bankruptcy or a purchaser from him cannot legally hold a policy issued to the bankrupt.

In any one of the cases where the Court has allowed the trustee to take the cash surrender value of a policy, including the cases cited by the bankrupt below, it has been quite clear that the cash surrender value equalled the actual value.

The bankrupt below contended that the trustee had no right to speculate upon the life of the bankrupt. Speculation is entirely unnecessary, because it is quite clear that these policies if put up at auction immediately would have a much larger value and would bring a larger amount than that for which the bankrupt wishes to obtain them.

Mr. Brainerd testified that the policy was worth more than the Company would pay (page 34) and that there is a market for such policies at prices above the amounts offered by the Company. (Page 33.)

Would there be any speculation in the trustee putting up at auction this policy the day after the adjudication in bankruptcy, on September 15, 1903, at which date it was assured that within six months the policy would be worth $11,318.40, according to Mr. Brainerd's figures, if Mr. Mertens lived, and if he died $20,000? And yet the bankrupt says that the Bankruptcy Act intended to give him the right by the payment of $5905.65 and an additional premium of $293 to take this policy and be assured of this great profit in the course of six months, from a contract which was absolutely the bankrupt's at the time of the adjudication. Such is not the theory of the Bankruptcy Act which, in short, is to absolve debtors from their debts, provided they give up all their property, but not to release them from their debts and let them retain for themselves contracts worth thousands of dollars.

POINT II. These policies did pass to the trustee. The claim of the bankrupt that policies which have no cash surrender value do not pass to the trustee, is not well taken.

The bankrupt, by his answer (pages 15 and 17) and in his argument in the Court below, having argued and

claimed that the policies did have a cash surrender value which was the small sum obtainable from the insurance company therefor, also inconsistently with that argument claimed that the policies had no cash surrender value whatever and that they consequently did not pass to the trustee and that the trustee never had any interest whatever therein. Assuming that the same argument will be made in this Court, we anticipate it.

This argument is based upon the contention that the real meaning of the proviso in Section 70-a-5 is that no insurance policies pass to the trustee except those which have a cash surrender value. This contention seems groundless, because Subdivision 5 of Section 70a of the Bankruptcy Act is general in its terms, and provides that the trustee shall be vested with "property "which prior to the filing of the petition he could by any "means have transferred or which might have been levied "upon and sold under judicial process against him"; then follows the proviso as to insurance policies which is quoted at the head of the last point.

We are unable to understand that part of the bankrupt's contention which is based upon the technical wording of the proviso, w' reby he claims that in said proviso it is implied that (y policies having a cash surrender value pass to the tr stee. A reading of the section, even if the language of t e Act is to be followed literally, does not seem to indicate that any exception is made other than of policies having a cash surrender value. We are unable to discover anything which says that policies not

having a cash surrender value do not pass. The general phraseology of the section seems to cover them absolutely, and the only exception contained in the proviso relates to policies having a cash surrender value.

It seems perfectly clear from the foregoing provisions of the Bankruptcy Act that these policies did, in fact, constitute assets and did pass to the trustee. It is quite clear that they had an actual value, not only from the terms of the policies themselves, but also from the testimony of Mr. Brainerd, and it further appears that they come expressly within the first part of Subdivision 5, namely, property which could have been transferred, because it appears from the evidence that these policies not only could have been transferred but were, as a matter of fact, prior to the bankruptcy, transferred by Mr. Mertens as security for loans, Policy No. 1 and Policy No. 4, Exhibits 4 and 7, having been transferred to the Varick Bank as security for its claims (page 21), and Policy No. 2, Exhibit No. 5, having been transferred to The Equitable Life Assurance Society as a security for a loan of $2500, and Policy No. 3, Exhibit No. 6, having been also transferred to The Equitable Life Assurance Society as security for its loan of $1775 (page 22); consequently, these policies being assignable, came expressly within Subdivision 5 of Section 70a.

Furthermore, it has been distinctly held that the proviso in that Subdivision does not prevent the vesting of insurance policies in the trustee but simply gives the bankrupt a right to redeem them from the trustee. This proposition has been expressly decided in the following

cases, the policy in the first case cited having been issued by the same company and being the same kind of a policy as the policies in question here:

In re Welling, 113 Fed. Rep., 189.
In re Slingluff, 106 Fed. Rep., 154.

There has never been any case where it has been decided that policies or property of any kind which had an actual value and which were not covered by Section 6 of the Bankruptcy Act, relating to exemptions, did not pass to the trustee. There are one or two cases which the reporters have held out in notes as holding that life insurance policies did not pass to the trustee, which cases were cited below by the bankrupt; but an inspection of those cases will show that they do not hold such a proposition. It is only where policies have been of such a nature that they had not only no cash surrender value, but no actual value and no value for any purpose whatever, that the Court has held that policies were not assets and did not pass to the trustee, the reason being that they were absolutely worthless.

These policies having, as is clearly shown (pages 33, 34) an actual value, did pass to the trustee, as has been decided in the cases above set forth. We cite the following from *In re Welling,* 113 Fed. Rep., 193:

"But it does not follow, as was assumed by the Court "below, and by the referee, that, because the policy does "not fall within the terms of the proviso, the bankrupt "has not property therein which passes to his trustee. "By the terms of the policy he was entitled to receive at

"the end of the tontine period the cash payment stipu-
"lated in the contract. That is a vested contract right,
"contingent only upon his surviving the tontine period.
"The right is valuable, increasing in value with each suc-
"cessive payment of premium. The policy, technically,
"had not a 'surrender value', within the meaning of the
"proviso; but it had an actual value, and that valuable
"right was right of property existing in the bankrupt.
"It is the plain provision of the bankruptcy law that all
"the estate of the bankrupt shall, by operation of law,
"be vested in the trustee, save such as is specifically ex-
"cepted by the provisions of the Bankrptcy Law, or by
"the law of the domicile of the bankrupt. The language
"of the provision is comprehensive. Subdivision 5, of
"Section 70a, declares that there shall be thus vested in
"the trustee 'property which prior to the filing of the
"petition he could by any means have transferred or
"which might have been levied upon and sold under
"judicial process against him'. Then follows the proviso
"which we have considered. It is clear that this proviso
"merely defines a certain class of insurance which may be
"excepted and exempted, by the action of the bankrupt,
"and upon the conditions stated, from the general prop-
"erty which by the law is vested in the trustee. In other
"words, the proviso is in the nature of a privilege to the
"debtor to retain such specified insurance upon yielding
"to the trustee the cash surrender value of the policy at
"the time of adjudication. All other property of the
"bankrupt, including all insurance owned by him, which
"does not fall within the provisions of the proviso, passes
"to the trustee. The statute cannot legitimately be con-

"strued to mean that a policy does not vest in the trustee "except it have a cash surrender value, and that such "may be rescued by the bankrupt upon the terms stated. "The meaning of the provision is clear,—that all the "property of the bankrupt except that specified in the "proviso, shall be vested in the trustee, and that also "shall pass unless the bankrupt avail himself of the priv- "ilege granted him by the law. The contract in question "gives to the bankrupt the right to receive at a certain "date a specified sum of money, contingent upon his sur- "viving to that date. This is a vested right of property "existing in the bankrupt, which passes to the trustee. "It is a property right which he could have transferred, "and it falls within the comprehensive language of the "section which vests title in the trustee."

The same doctrine is held

In re Slingluff, 106 Fed. Rep., 154,

where the whole question is very fully and ably discussed. We also cite

In re Holden, 113 Fed. Rep., 141,

which holds that an endowment or semi-tontine policy, issued by the Northwestern Insurance Company, is assets. Also

In re Scheld, 104 Fed. Rep., 870-872.

Whenever the bankrupt claims that a part of his property does not pass to the trustee by virtue of the bankruptcy proceedings, the burden of showing that claim to be well founded is upon the bankrupt, because it is the theory of the Bankruptcy Act to grant immunity from

debt to the bankrupt upon his surrendering all his property. Manifestly any exception, under which the bankrupt, while still claiming the discharge of his debts, seeks to retain his property, must be very clear, explicit and convincing, and the burden is upon him to show such exception. In case of any doubt, the benefit thereof should be given to the trustee.

In re Turnbull, 106 Fed. Rep., 667.

All of the cases which were cited by the bankrupt relating to this point in the Court below, were subject to the same criticism which we raised in the foregoing point, for none of those cases hold that a policy having any actual value does not pass to the trustee. Every case in the books, so far as we have been able to find, is an authority for the proposition that where a policy has any actual value it passes to the trustee and the trustee can hold it; consequently they hold that the trustee has an insurable interest and that it is not against public policy for him to hold such policies. They are, therefore, all authorities against the proposition which the bankrupt in the Court below claimed was laid down in Warnock vs. Davis, 104 U. S., 775, which we maintain is no authority whatever for the proposition that a trustee in bankruptcy or his assignee is incapable of holding a policy which has been regularly issued by a company to the person upon whose life the same is written. To sustain the contention of the petitioner would be to hold that nothing could be obtained by a bankrupt's creditors from the bankrupt's life insurance contracts, no matter how valuable the same might be. On the other hand, it is well settled that poli-

cies of insurance are assignable and are valid in the hands of the assignee.

St. John vs. American Life Insurance Co., 13 N. Y., 31.

Valton vs. National Fund Life Assurance Co., 20 N. Y., 32.

Dannhauser vs. Wallenstein, 169 N.Y., 199.

Steinback vs. Diepenbrock, 158 N. Y., 24.

In reference to two of the cases which were cited below by the bankrupt, the Court says in Steinback vs. Diepenbrock, at page 31, "Cammack vs. Lewis (15 Wall., 643) "and Warnock vs. Davis (104 U. S., 775) were cases "where the policies were taken out in order that they "might be assigned to the assignees through their pro- "curement, under circumstances that might well be held "to be in evasion of the law prohibiting gaming policies."

The policies in question were all issued by a company incorporated under the Laws of New Work and Mr. Mertens was a citizen of New York, and it is therefore contended that these policies must be construed according to the Law of New York.

The order and decree of the Circuit Court of Appeals should be reversed, and the order and decree of the District Court affirmed, with costs, and the case remanded with instructions to the Courts below to proceed accordingly.

All of which is respectfully submitted.

WILL B. CROWLEY,
Counsel for Petitioner.

FILE COPY.

No. [redacted] 209

Office Supreme Court U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES.

ALBERT K. HISCOCK, TRUSTEE IN BANKRUPTCY, OF JACOB M. MERTENS, *et al.*

Petitioner,

vs.

JACOB M. MERTENS,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

J. P. Fralick, Law Case Printer, 100 Wieting Blk.

IN THE

SUPREME COURT OF THE UNITED STATES.

ALBERT K. HISCOCK, TRUSTEE IN BANKRUPTCY, OF JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS AND EDMUND A. MERTENS, INDIVIDUALLY AND AS COMPOSING THE COPARTNERSHIP FIRM OF "J. M. MERTENS & Co.", *Bankrupts*,

Petitioner,

vs.

JACOB M. MERTENS,

Respondent.

BRIEF FOR RESPONDENT.

The respondent contends that under the rules laid down by the Supreme Court, no case for the granting of a writ of certiorari has been made, and that a review of the decision of the Court below is unnecessary and inexpedient for the following reasons:

I.

To the parties the matter is of small and rapidly diminishing importance.

Nominally, four policies of insurance aggregating $100,000. are involved; actually, a comparatively small sum is in issue.

In the first policy, No. 252314, issued by the Equitable Life Assurance Society for the sum of $10,000., it is conceded the trustee has no interest. (Petition, Fol. 9.)

Policy No. 417171, issued by the Equitable Life Assurance Society of the United States, insured the life of the respondent in the sum of $50,000. At the time of the adjudication in bankruptcy it was encumbered for many times its value. Pending this proceeding it has been sold at public auction by the pledgee thereof, bringing a small part only of the amount for which it was pledged. Neither the trustee nor the bankrupt have paid premiums on the same. An examination of the record, (Fols. 122-127, 305-315) sufficiently demonstrates that this policy has no value to the parties to this proceeding and it may be dismissed from further consideration.

Of the two remaining policies, No. 274445 insuring the life of the respondent in the sum of $20,000. is a *semi-tontine* policy *Form number H-83* issued by the

Equitable Life Assurance Society March 10, 1884. It had, therefore, been in force about nineteen years and six months at the time of the filing of the petition in bankruptcy and there remained to be paid but one semi-annual premium to mature the same. It was pledged to the Equitable Life Assurance Society to secure the payment of the sum of $2500. and had in accordance with the uniform practice of the Company a cash surrender value of $5905.65. (Fol. 169). This sum the Company was ready and willing and offered to pay upon its surrender, and this sum the bankrupt was ready and willing and offered to pay the trustee. On March 10, 1904, the date of its maturity, it had an actual value of $11,318.40, less the last premium upon the same paid by the receiver of the respondent's estate in bankruptcy, less the amount of the encumbrance on the policy. (Fol. 180). This is considerably more than the cash surrender value a few months earlier. Still it has never been the policy of Life Insurance Companies to permit policy holders to withdraw before maturity the profits on their policies, or any sum approximating the matured value thereof. To do so would be to place a premium on lapses and withdrawals. The amount which the Company will pay in cash or paid-up insurance is usually regulated, as in New York, by a State statute, applying without discrimination to all policies and requiring some return to be made to the withdrawing policy holder after default in payment of a premium. The cash surrender value offered by the

Company in this case was the full cash surrender value of the paid-up policy, which the Company was compelled by law to issue. (Fols. 362-367). It did not include the profits on the policy as distinguished from the reserve as that the law of New York does not require. (Fol. 365). There is nothing in the record to indicate that any Company ever distributes its profits before the actual maturity of a policy.

This cash surrender value is paid by Insurance Companies because the laws of the various States now require it or its equivalent to be paid; hence, in the new certificates issued by some Companies a definite cash surrender value is stated. *The time, terms and conditions on which the policy in question would be received on surrender are precisely the same as in the case of a policy having a definite provision for a cash surrender value.* (Fols. 150-152, 154, 155, 160-164). The petitioner's argument that the cash surrender value of policies issued on this form was less than those of some other form is not borne out by any evidence in the record.

The other policy in question here is called a *Free Tontine* Policy *Form No. H-89.* It was issued by the Equitable Life Assurance Society of the United States January 28, 1889, and insured the life of the respondent in the sum of $20,000. It was hypothecated to the Equitable Life Assurance Society to secure the payment of a loan of $1775. and had a cash surrender value of $2272.56, what its value at maturity will be is not known. (Fol. 169).

Upon these two policies annual premiums have been paid aggregating $1270. and this is the third year since the respondent was declared a bankrupt. These premiums have been paid by the trustee, but under an agreement that he shall be re-paid the same with interest, in addition to the cash surrender value, in case the bankrupt is permitted to redeem the policies. (Fols. 315-327). The premiums paid on policy No. 274445, the most valuable of the policies, are absolutely lost. The policy having matured these premiums simply keep it alive and in no way enhance its value; hence, every year that realization on these policies is postponed diminishes the already small difference between the cash surrender values and the maturity values, which difference only is in question here.

II.

The matter is not of public or general importance.

The Bankruptcy Act, §70a-5, refers to the policy which may be redeemed and retained by the bankrupt as "any insurance policy which has a cash surrender value." It does not undertake to distinguish between the various forms of policies, neither should the Courts do so.

The argument of the petitioner goes to the details of these policies. It involves no general principles. He

says, in substance, that under these particular and peculiar policies issued by this particular Society, there are investment features which distinguish them from some of the other forms of policies which have a cash surrender value. That this is particularly so in the State of New York, where the statute permits the insured to demand a paid-up policy upon default in paying a premium, but does not permit him to demand cash. *The distinction is not very great, however, as it is conceded that the paid-up policy issued pursuant to Statute has itself a cash surrender value.* (Petition, Fol. 20).

An effort to set up arbitrary distinctions between the various forms of policies, between the policies written at different periods and by divers Companies, Societies, Associations and Fraternities, and between their provisions as controlled and regulated by the statutes of the various States, would lead to endless confusion and often to unfair discrimination. Why look for distinctions where none are made by the Statute?

The Supreme Court has very wisely decided that it is better to follow the Statute which permits the bankrupt to pay or secure to the trustees the cash surrender value of "any insurance policy which has a cash surrender value" and thereafter to continue to "hold, own and carry" the same. (*Holden vs. Stratton*, 198 U. S., 214).

Upon petitoners's theory of this proceeding, a further decision of the Supreme Court would settle the law as to one only of the countless forms of life insurance policies.

It would be an authority as applied to Equitable policies *Form H-83 and Form H-89* and as to other forms not involved would be *obiter*. Adopting the petitioner's views as to *obiter dicta* a decision would be of no avail beyond this particular controversy, and upon the general proposition, the Supreme Court has already expressed itself with great clearness.

III.

The decision of the Circuit Court of Appeals is unquestionably correct.

It is not our intention here to re-argue the merits of this controversy. It is probably sufficient to suggest that the decision of the Circuit Court of Appeals followed the plain command of the Statute and the decisions of its own Circuit, which had stood unquestioned for thirty years.

In re McKinney, 15 Fed. Rep., 535.
In re Newland, 6 Ben., 342.
Warnock vs. Davis, 104 U. S., 775.
In re Boardman, 103 Fed. Rep., 783.
In re Steele, 98 Fed. Rep., 78.
Steele vs. Buell, 104 Fed. Rep., 972.

IV.

The Circuit Court of Appeals expressly followed the principles laid down by the United States Supreme Court in the case of Holden vs. Stratton. 198 **U. S.,** 214.

The decision is not only in exact accord with the concluding sentences of the opinion in the above case, but to quote therefrom *"harmonizes with the practice under the Bankruptcy Act of 1867 * * * and tends to elucidate and carry out the purpose contemplated by the proviso as we have construed it."*

The deliberate opinion of the United States Supreme Court in the case of Holden vs. Stratton was a sufficient precedent for the Circuit Court of Appeals in the decision of this case, and is ample to guide the lower Courts in answering questions as to the various forms of life insurance policies involved in almost every bankruptcy proceeding, without an express decision of the Court of last resort as to each form of certificate. Any cases that seem to differ from the decision of the Circuit Court of Appeals herein were rendered prior to the decision of the Supreme Court in the case of Holden vs. Stratton. The decision in that case was sufficient to settle any doubt that had therefore existed as to the construction of the clause of §70 under consideration here.

V.

'It is not for the best interest of bankrupt estates that intermediate orders and directions in bankruptcy made by the Circuit Court of Appeals in the exercise of its supervisory power should be subject to review by this court, except it be in cases of great importance or where public interests are involved.

In addition to very generous rights of appeal the National Bankruptcy Act provides for review of minor controversies by petition. Questions arise in the midst of a bankruptcy proceeding upon which the trustee desires instructions and they may be brought up, while the proceeding proper is pending, by petition to review. The complete record is not printed, but only the part thereof relating to the particular matter of which revision is desired.

It was clearly the intention of the statute by these provisions to furnish a summary method of reviewing intermediate orders and directions of the Bankruptcy Court; for frequently pending the decision thereof, all progress in the settlement of the bankrupt's estate is necessarily stayed. The matter which it is now sought to bring into the Supreme Court is one of this character. It relates to a review by petition of an intermediate order in a bankruptcy proceeding from which no appeal would lie. It has been decided by the Circuit of Appeals in a

manner consistent with the decisions on the same and similar subjects by the Supreme Court. The administration of a very large estate should not further be delayed where no matter of public or general importance is involved, and where the rights of the litigants and creditors would suffer thereby.

It is urged that the Circuit Court of Appeals desires to have its decision reviewed by this Court. The Circuit Court of Appeals has taken no steps to that end by certification of questions or otherwise and has said nothing to indicate that it has any wish upon the subject.

For the reasons above briefly stated and which appear more fully from an examination of the record, the respondent respectfully submits that the prayer of the petitioner should be denied with costs.

DORR RAYMOND COBB,
of Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

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ALBERT K. HISCOCK, TRUSTEE IN BANKRUPTCY OF JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, AND EDMUND A. MERTENS, INDIVIDUALLY AND AS COMPOSING THE CO-PARTNERSHIP FIRM OF "J. M. MERTENS & CO.," BANKRUPTS,

Petitioner,

vs.

JACOB M. MERTENS,

Respondent.

No. 209.

BRIEF FOR RESPONDENT.

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Counsel for Respondent,

Syracuse, N. Y.

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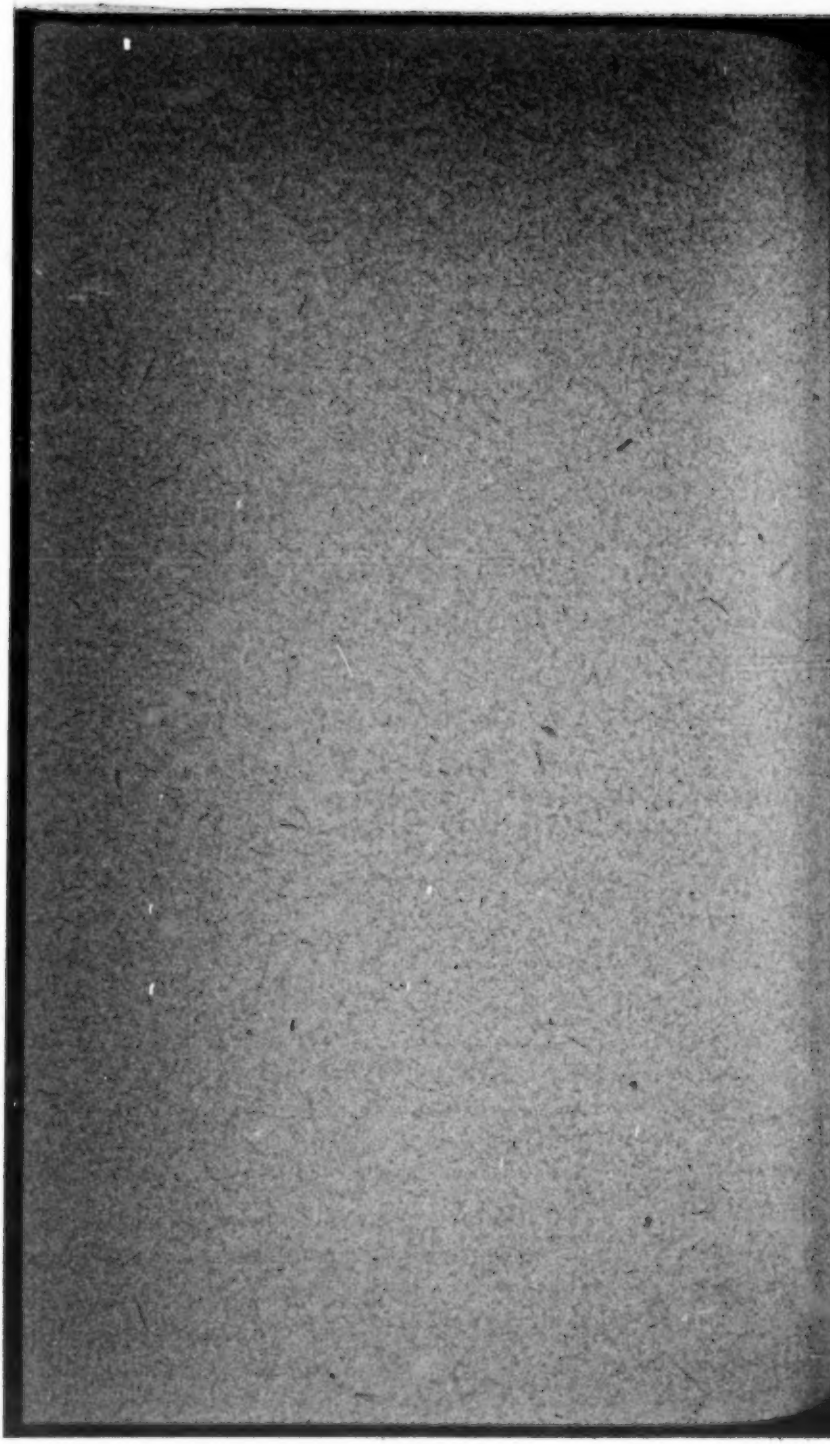
1907.



SUPREME COURT OF THE UNITED STATES.

ALBERT K. HISCOCK, TRUSTEE IN BANKRUPTCY OF JACOB M. MERTENS, CHARLES R. MERTENS, ERNEST T. MERTENS, AND EDMUND A. MERTENS, INDIVIDUALLY AND AS COMPOSING THE CO-PARTNERSHIP FIRM OF "J. M. MERTENS & Co.," BANKRUPTS,

Petitioner,

vs.

JACOB M. MERTENS,

Respondent.

The history of this litigation is stated with substantial correctness in the brief filed by the Petitioner. The statement of facts requires some correction and amplification which will be made in the discussion of the following points.

I.

The policies in question had a cash surrender value within the meaning of Section 70a of the National Bankruptcy Act and the Circuit Court of Appeals has properly decided that upon the payment of that cash surrender value to the trustee, the bankrupt may continue to "hold, own and carry" said policies as permitted by that section of the act.

The controversy is over three policies of insurance written by the Equitable Life Assurance Society, insuring the life of the Respondent in the aggregate sum of Ninety Thousand Dollars. While differing slightly in language, these policies are substantially alike and the controversy with reference to each is governed by the same principles.

The lower Court has held that the policies in question are Policies of Life Insurance and have a cash surrender value within the meaning and intent of the statute referred to, and that upon Respondent's paying such cash surrender value, which the record (page 31) shows to be $14,752.21, he may continue to carry such policies.

The decision remanded the cause (page 105) "with instructions to give the bankrupt an opportunity to pay and secure the actual value which would be paid on surrender according to the uniform practice of the company."

The Petitioner contends *first* that the policies in question are not life insurance policies. *Second*, that they have no cash surrender value.

At the outset of this litigation, an arrangement was made by which the premiums on the policies were to be paid without prejudice to either party until such time as the Court had determined whether or not said policies had a cash surrender value, and if they had no cash surrender value, whether they passed to the trustee or remained the property of the bankrupt. (Pages 19, 20, 59).

On policy No. 274445 of $20,000, Respondent had paid premiums at the time he was adjudged a bankrupt, for nineteen years. On policy No. 415768 of $20,000, he had paid premiums for fifteen years and on policy No. 417171 of $50,000, for fifteen years. The latter policy was so encumbered as to be of little if any value. (Page 21).

At the time of taking out the first policy, respondent was thirty-eights years of age, while at the time of taking out the second and third policies, he was but forty-two. (See Application and Policies). When this bankruptcy proceeding was instituted against him, he had therefore reached the age of fifty-seven years.

These policies had been taken out in good faith many years before bankruptcy threatened him and possessed a value as protection to the insured and his family, far beyond any sum which could be realized by the trustee in bankruptcy.

The policies are written on the usual tontine or endowment forms and while giving the insured various options, do not in express terms, give him the right to a cash sum on the surrender of the policies during the running of the endowment term.

That the policies in question had, as a matter of fact, and practice, a cash surrender value; that they were recognized by the company as having such value; that the same was determined by a fixed and definite method of computation uniform in all cases, and that such value

had without exception been paid to persons insured by the company upon surrender of like policies fully appeared by the evidence and was not contradicted. (Pages 26, 27, 30, 31, 32).

It also appeared that the company had fixed the cash surrender value of each of the policies in question, and offered to pay the same, and such cash surrender values were stated on the record by one of the company's managers as follows: (Pages 30-31).

Policy No. 274445,	$5905.65
Policy No. 417678,	2272.56
Policy No. 417171,	6574.00

These cash surrender values which the company stood ready and offered to pay were based on the definite method of computation referred to as applicable to all similar policies. Such uniform plan the company was bound to pursue as the Statutes of the State of New York prohibit a life insurance company from making any discrimination "*in favor of individuals of the same class or the same expectation of life either in the amount of premium charged or in any return of premium, dividends or other advantages.*" (Page 68).

Premiums on each of the policies having been paid for more than three years, respondent had at all times the right to surrender either of his policies and receive in lieu thereof, a paid-up policy (page 43) "for the entire amount which the full reserve on this policy according to the present legal standard of the State of New York

will then purchase as a single premium calculated by the regular table for single premium policies now published and in use by the society." This is substantially the legal requirement in the State of New York. (Page 67).

At page thirty-two Mr. Brainard, one of the company's managers, cross-examined by counsel for Petitioner, testified:

> Q. Mr. Brainard, you testified this morning, that the sum of money which your company would pay for the surrender of a policy of this nature, was computed according to a uniform rule adopted by it for policies of the same class, is that right?
>
> A. I did.
>
> Q. Upon what basis is that computation made?
>
> A. Do you mean what is the process of computing it?
>
> Q. Yes, or to what is it equivalent?
>
> A. It is equivalent to the percentage reserved under that policy which the company is willing to pay in consideration of the surrender.
>
> Q. Is the sum which you testified to this morning, $5,905, being the amount which your company would have given, for the surrender of policy No. 5, equivalent to the same sum as would be obtained if your company issued a

paid-up policy as it is bound to do under the terms of Exhibit 5, and then figure the value of that policy?

A. Yes, it is.

By the Court:

Q. If this policy, Exhibit 5, were presented and a demand under it made for a paid-up policy, such a paid-up policy would be issued under the provisions of the conditions of Exhibit 5, and is that present cash value of that paid-up policy the measure of the amount which you stated as the cash surrender value which the company is willing to pay?

A. That is as I understand it.

Q. So that instead of giving a paid-up policy the company is willing to give an equivalent of that amount in cash?

A. Yes.

Petitioner contends that the fact that the cash surrender value of the paid-up policy which the company agreed and was bound to give, is the measure of the cash surrender value of these policies in some way differentiates them from other policies having a cash surrender value. We do not appreciate the argument. The contractual and statutory obligation to give the insured a paid-up policy assures a cash surrender value and fixity and uniformity in its payment. It is apparent as a practical question that policies having a cash surrender value will have a paid-up policy value and *vice versa*.

In the MacKinney case (15 Federal Reporter, 535, 538), which will be referred to more at length later, it was the fact that the company was under obligation to give a paid-up policy equivalent to four-fifths of the reserve that gave the policy its cash surrender value. Here the company is under obligation to give a paid-up policy equivalent to the full reserve (pages 52, 67). It would seem that the payment of cash surrender values is largely the outgrowth of statutes designed to protect the policy holder who was unable to continue his policy and had made default.

It is apparent from the evidence in the case (pages 29, 31) that a policy, giving the insured the right to demand a definite cash sum upon the surrender of the same, could not have been procured at the time respondent obtained the insurance on his life nor for many years thereafter. Although the Equitable Life Assurance Society has been one of the most progressive companies, modern in all its methods, Manager Brainard testified that he never knew of a policy being issued prior to 1896 with a definite provision for or promise of a cash surrender value.

The surrender value of the policies in question here is payable at the usual time and on the usual and ordinary conditions, namely, that they must be presented for surrender within six months after default in the payment of a premium.

Neither by the policies in question nor under any other

form of insurance contract, so far as the record discloses, is the insured given the right to surrender his policy at any moment and demand the cash value.

Under all forms of insurance contract issued by the Equitable Life Assurance Society, even the new table policies with definite provision for a cash surrender, the insured must demand the cash surrender value upon the lapse of his policy or within a given period after default in the payment of a premium. (Pages 27, 29).

The conditions upon which the cash surrender value will be paid are precisely the same with all forms of policies. (Page 29).

It would seem to be a sufficient answer to petitioner's argument on this point that the cash surrender value will be paid on these policies in the usual and ordinary course of business—upon the same terms and conditions—as the policies before the Court in Holden vs. Stratton, 198 U. S., 202, and *in re* Boardman, 103 Fed. Rep., 783.

The reports of other cases and the statutes of the several States relating to this subject, do not indicate that surrender values are paid by other companies on any different terms than those adopted by the Equitable Society. There is nothing in the record here from which it can be inferred that different conditions prevail with other companies.

The petitioner has made quite an extensive argument against interpreting the statute to include these policies

on the ground that in the case of one of them which had run for nineteen years, the time was near at hand when the term of the policy would be complete and the assured would be in a position to exercise either of the several options reserved in the policy, one of which would permit him to receive a sum in cash considerably greater than the cash surrender value at the time of the adjudication in bankruptcy, as it would include dividends and profits.

We fail to see how the condition of this particular policy at the time of the adjudication in the bankruptcy proceeding throws any light upon the interpretation to be given to the statute. Had the policy been in force but two years no point could be made of it. Because the policy had but a few months to run and therefore there was considerable disparity between its cash surrender value and its full value at the end of its term, can we say it was not a life insurance policy?

Petitioner says that by paying another premium and continuing the policy, the trustee could get the benefit of the matured value of the policy; he could carry it at a reduced premium; surrender it for a life annuity; withdraw the surplus and continue the policy on the ordinary plan; exchange for a paid-up policy or take the reserve value, surplus and dividends and consent to the cancellation of the insurance. The argument does not consider that this would be to deprive the insured and confirm in the trustee, the very benefits which it was the intention of the statute to permit the bankrupt to enjoy.

The argument would exclude all policies maturing be-

fore the death of the insured, and which would naturally have a substantial cash surrender value, and limit the application of the statute to straight-life policies, a class which except for statutory provisions in some States, would have little, if any, cash surrender value.

No argument of general value or application can be based on a peculiar situation with reference to a single policy. This is particularly true where the only question is as to the interpretation to be given to the language of a statute.

The cash value which this policy has gained pending the proceeding in bankruptcy, is of no more consequence in the interpretation of this statute than is the fact that pending the proceeding, the policy of Fifty Thousand Dollars has been sold by a creditor who held it as collateral to his debt so that it is now lost to the bankrupt.

There is nothing in the record in this case, nor in the facts as disclosed in the reports of other similar cases, indicating that the sum offered upon the surrender of one of these policies is less than would be received upon the surrender of a policy of any other kind that is written, of like age and amount.

The record does not disclose then the slightest practical difference so far as concerns surrender value, between the policies in question here, and the new form policies with a definite provision for and tables of cash surrender values.

The fact that these policies state or indicate that they do not have a cash surrender value is of no consequence when the company has tendered such value.

There remains the theoretical difference only; in one case the insured at the time and under the conditions outlined in his policy, can demand a cash sum upon its surrender. In the other, the company being under no legal obligation, tenders a like sum payable at the same time and upon the same conditions.

Petitioner insists that the provision of the Bankruptcy Law permitting the insured to retain his policies on payment to the trustee of their cash surrender values, applies to the one case and not to the other. He concedes, and it is the theory of the cases upon which his argument rests, that if the company were legally bound to pay the precise sum which it has tendered in this case, the respondent could have the benefit of the statute, but since the company tenders that sum, not being so bound, he says that the statute does not apply. Upon this theory, if in this case the company were legally bound to pay Fourteen Hundred Dollars, the trustee would be compelled to accept that sum, while a voluntary offer of Fourteen Thousand Dollars could be disregarded. The statute under consideration says: "When any bankrupt has any life insurance policy which has a cash surrender value." This description is as broad and general as our language permits, no distinctions or discriminations are made or even remotely suggested. That it does not alone refer to table forms promising definite sums at definite periods in

the life of the policy is apparent from the provision that the bankrupt is not called on to act until "after the cash surrender value has been ascertained and stated."

An interpretation of the statute which would confine its application to a class of policies limited in number and only recently offered to the public, issued by some companies and not by others, and which would exclude from its benefits all old-line policies, all straight-life policies, and all the various forms of policies redeemable in cash, though redemption is not expressly guaranteed in the policies, would be narrow and unjust, and would convert a wise and beneficent statute of general application into a provision, technical, discriminating and partial.

Beginning with what is known as "straight-life" policies, the business of insurance has grown until countless forms of policies are now offered to the public, each company aiming in its own particular way, to meet the wish of every possible candidate for life insurance. The plans are worked out by actuaries and are based on definite and known conditions and one policy equalizes with another.

It is well known that the insured can usually obtain a cash sum upon the surrender of his policy, but that he thereby loses his right to participate in dividends, surplus and profits. It is to the interest of the company to encourage its policy holders to persist in the payment of premiums, and no policy holder can obtain a sum upon the surrender of his policy equal to its value if he persevere to the end. But where the company, as in this case,

and as is the case with all companies in the State of New York, is bound upon surrender to give a paid-up policy for a sum computed on a definite basis, it follows that the insurer as the company in the present case has uniformly done, will pay the insured, the equivalent of the paid-up policy in cash.

If the statute should be limited to cases where the company is under compulsion to pay a cash surrender value, then not only is a discrimination made between holders of policies of slightly different form, but between holders of the same policy resident in different states. For instance, a company might in New York State be compelled to give only a paid-up policy (page 68), while in Kentucky, the law would force it to give the equivalent of the paid-up policy in cash. (Kentucky Statutes—Carroll, 1903—Sec. 659). So that according to the theory proposed by petitioner, the same policy might have a cash surrender value in Kentucky and none in New York, although the same sum could be realized upon the policy in either State.

It is, therefore, quite apparent that if the Courts are to attempt to distinguish between policy holders upon the basis of the surrender value being paid voluntarily or by compulsion, not only will confusion result and injustice be done, but the statute will be to a large extent annulled.

The argument for this narrow construction overlooks the policy of the law carefully pointed out in the recent case of Holden vs. Stratton (198 U. S., p. 202).

We assume that the prime object of Congress in including in Section 70a the proviso under consideration, was as stated by Justice White in the above case: "To confer a benefit on the insured bankrupt"; to preserve to the bankrupt, a kind of property which has a value peculiar to himself and as protection to his family.

It is apparent that to a man of respondent's age, the loss of these policies is irreparable. That in many cases advancing years and declining health would prevent a successful application for further insurance and if obtained it would be at a cost commensurate with the increased risk.

In the second place, such policies would have no value to the trustee, excepting as it could be obtained by a surrender of the same for cash.

The necessity of a prompt settlement of bankrupt estates would prevent the continuance of policies for a term of years. Then it is clearly contrary to the policy of the law to permit the trustee of a bankrupt estate to continue the payment of premiums on the bankrupt's insurance policies, even though the age and state of health of the insured bid fair to make such a speculation profitable.

Again, the trustee would have no such insurable interest in the life of a bankrupt as would permit him to take out or continue insurance upon his life. Further, it would scarcely be good policy to sell contracts of insurance on the bankrupt's life as suggested by petitioner to persons who would buy for purposes of wager or specula-

tion even though the policies would have a value in the hands of such speculators well beyond their cash surrender value. This also would be to permit the speculator and the trustee to have the benefit of the very property in the policy which it was the object of the law to preserve to the bankrupt and would be against public policy as declared by this Court.

Warnock vs. Davis, 104 U. S., 774, 779.

N. Y. Life Ins. Co. vs. Armstrong, 117 U. S., 591.

Crotty vs. Union Mutual Ins. Co., 144 U. S., 621.

It is lastly to be considered that under the former Bankruptcy Act, this very question of surrender value had been before the Courts and it had there been decided that insurance policies passed to the assignee in bankruptcy only to the extent of their "cash surrender value"; that being treated as the sum which the company would voluntarily pay upon the surrender of the policy.

Such was the law and these are the circumstances existing at the time of the passage of the present Bankruptcy Act.

Did Congress manifest an intention to change the law as it had been understood and practiced under the former Bankruptcy Act? The contrary is clearly true, for while the former act contains no provision permitting the insured to redeem his policy by paying its cash surrender value—that was worked out by the Courts—the framers

of the present act borrowed from the Court decisions this very principle and embodied it in the statute, and embodied it in plain and general language applicable to all policies of life insurance having a "cash surrender value"; that being the exact term used in the MacKinney case to describe a policy upon the surrender of which the company was willing to pay a cash sum. (*In re* MacKinney, 15 Fed. Rep., 535).

Had Congress intended to exclude endowment policies, term policies, ten, fifteen or twenty annual payment policies, tontine, semi-tontine, or free tontine policies, bond or bounty policies, there would have been some indication of that fact.

The petitioner makes distinctions where Congress made none. However forceful his argument might be before a legislative body, having legislation on the subject in contemplation, we submit that it is not relevant in this Court, for however valuable an argument may be made that Congress ought to have distinguished between the various forms of life insurance contract—and we fail to see any just ground of discrimination—the fact remains that it did not do so; and if a distinction is to be made, the one suggested here is not a just one, resting as it does on form rather than substance, discriminating as it does between policies precisely the same in practice and legal effect.

If distinctions are to be made, if some policies having a cash surrender value are to pass to the trustee absolutely

while others may be redeemed, such distinction and discrimination should be made by Congress after a careful investigation of all the facts and should rest on some consistent and rational basis. The Court should not impute to Congress, an intention not manifested in its act. That would be, as aptly stated in Holden vs. Stratton, "not construction but legislation."

The question as to what interest in an insurance policy on the life of the bankrupt, payable to his estate passed to the assignee in bankruptcy under the Act of 1867 was discussed by Judge Brown of the Second Circuit in an opinion which remained an unquestioned authority while that Act was in force. (*In re* MacKinney, 15 Fed. Rep., 535).

It has recently been cited with approval by the Supreme Court, Holden vs. Stratton (198 U. S., 202, 214), and by the Circuit Court of Appeals for the Second Circuit (*In re* Coleman, 136 Fed. Rep., 818), and undoubtedly was the occasion for the adoption of the proviso to Section 70a of the present Bankruptcy Act.

The Act of 1867, in language sufficiently comprehensive to embrace the most minute and temporary interest in property, vested in the Trustee all the assets of the bankrupt. By its terms the Act preserved to the bankrupt no interest in insurance policies on his life.

It appeared that the bankrupt, Andrew MacKinney, had a policy with the Berkshire Life Insurance Company of $3,000, which was payable to his estate. The policy

was not turned over to the assignee in Bankruptcy, but the wife continued to pay the premiums upon the same until the death of the bankrupt, when the question arose as to what part, if any, of the $3,000 owing by the company was payable to the trustee in bankruptcy. The referee reported that the net value of the policy at the time of the adjudication in bankruptcy was $686.42, which was more than would have been paid for the surrender at that time". By the terms of the policy, there was no sum which the insured could at the time of his bankruptcy, demand upon the surrender of the policy but the company was willing to pay a certain portion of the reserve, and this sum, the Court throughout its opinion treats as the "cash surrender value"; in the course of its opinion, saying: (pages 537 and 538).

> "Upon the surrender of the policy before the death of the assured, the company, to be relieved from all responsibility for the increased risk which is represented by this accumulating reserve, could well afford to surrender a considerable part of it to the assured or his representative. *A return of a part in some form or other, is now usually made; and by the provisions of this policy, under the Law of Massachusetts, four-fifths of this reserve or surrender value was applicable on default as a single premium for a paid-up policy. To any person, moreover, having an insurable interest in the life of the insured, and desirous of maintaining the policy to whom it might be assigned, this surrender value would be worth its full tabular*

amount. To the extent of its actual cash surrender value therefore, this policy at the time of the bankruptcy was 'property' and 'effects' of the bankrupt within Sections No. 5044 and No. 5046 of the Revised Statutes, and as such passed to the bankrupt's assignee. So far as necessary to make the cash surrender value available, the title to the policy also passed to the assignee, so that he might thereafter either surrender it to the company or assign it over either to the bankrupt or to any other person having an insurable interest in his life, upon receiving payment of the surrender value at that time or so much of it as the assignee might be able to obtain."

In a further division of the opinion, the learned Judge continues: (page 539).

"The assignee moreover, could have no right to use moneys of the estate to pay premiums during the bankrupt's life, and thus keep the estate unsettled for an indefinite period, for the mere purpose of speculating upon the chances of the bankrupt's early death. The speedy settlement of estates of bankrupts, as contemplated by law, is incompatible with such dealings.

But not only was the executory part of this policy, i. e., everything beyond its surrender value, not assets of the bankrupt, but the as-

signee in bankruptcy had no such insurable interest in the life of the bankrupt as rendered him an assignee legally capable of continuing the policy for his own benefit, and ultimately recovering the whole amount under it." (Citing Warnock vs. Davis, 104 U. S., 775).

The Court decided that out of the avails of the policy there should be paid to the assignee in bankruptcy the cash surrender value thereof, and the balance should pass to the estate of the deceased bankrupt.

In the case entitled *in re* Newland, 6 Ben., 342 (18 Fed. Cases, 90), a creditor held a policy of insurance of $4,000 upon the life of the bankrupt as collateral security for the payment of a debt of $3,450. The creditor, attempting to prove her claim for the full amount, the assignee in bankruptcy insisted that she must either surrender the policy to him and take a dividend on her entire claim or retain the policy and withdraw her proof of debt. The Court, Judge Blatchford rendering the decision, permitted her to retain her policy and prove her claim at the full amount less the cash surrender value of the policy which was $13.13.

In view of the principles laid down in the recent case of Holden vs. Stratton, above cited, and of its expression upon the precise question here involved, a lengthy discussion of the cases on this point decided by the lower Federal Courts, since the passage of the present Bankruptcy Act, seems unnecessary.

In re Boardman (103 Fed. Rep., 783), involved a policy issued by the same company and on the same form as two of the policies in controversy here. The question there, as here, was whether the policy had a "cash surrender value" within the meaning of Section 70a. The policy was for $2500. The company offered to pay the assured $692.50 in cash upon the surrender. *The conditions were the same as here—surrender value to be paid on default in payment of a premium or within six months thereafter.* The referee reported:

> "I think the policy has a 'cash surrender value' within the meaning of the Bankruptcy Act. I do not find that there is any exact definition of this term as a matter of judicial determination. But it seems to me to mean the sum the company will pay upon the surrender and discharge of the policy; and it makes no difference whether the amount is an arbitrary one fixed by the statute or one settled by the terms of the policy or merely a voluntary matter on the company's part."

Judge Lowell, in confirming the referee's report said:

> "In this case I agree with the referee. The policy has a cash surrender value within the intent of the statute. The fact that this value is not stated in the policy is immaterial. If in the ordinary course of business, the bankrupt can obtain cash from the company by a surrender of this policy, the creditors are entitled to the cash."

In the above case, the bankrupt claimed that the policy had no cash surrender value, therefore it did not pass to the trustee, while the trustee claimed that it had a cash surrender value, which he was entitled to receive. Evidently it did not occur to the attorney for the bankrupt, the trustee, or the distinguished Judge, that the policy could be claimed by the trustee as his sole property on the ground that it had no cash surrender value.

The following cases also bear upon this point.

In re Lange, 1 Am. B. R. (91 Fed. Rep., 361).
In re Steele, 98 Fed. Rep., 78.
Steele vs. Buell, 104 Fed. Rep., 968.
In re Coleman, 136 Fed. Rep., 818.

In re Welling (113 Fed. Rep., 189), and *in re* Slingluff (106 Fed. Rep., 154), are the authorities relied on by the Petitioner. In each the Court reached the conclusion that Section 70a of the Bankruptcy Act applied only to cases where the policies had a definite provision as to cash surrender value. In neither, however, did the Court go to the length of holding, as did the District Court in the present case, that the bankrupt had no interest in the policies on his life, and that they passed absolutely to the trustee; in order as stated in the decision (page 91) "to permit of the sale of said policies by said trustee or the exercise of the options provided in said policies by said trustee or the collection of any moneys due or to become due from said life insurance society upon the said policies or either of them."

In neither of these cases was the practice under the former Act in Bankruptcy discussed, nor were the authorities cited in this connection by the Supreme Court in Holden vs. Stratton considered.

In the Slingluff case, the Court says: "It may be that if the whole sum secured by the policy should be collected by the trustee, only the proportion thereof ascertained to have been equitably to the credit of the policy at the date of the adjudication with the outlay for premiums would be allowed to be retained by the trustee. But the question of whether the trustee would be entitled to the whole proceeds or not, it is not at all necessary to consider now in this case, for if necessary to be ascertained there are settled principles upon which an actuary can determine the amount to which the policy was entitled equitably at any stated date."

In the Welling case, the Court in concluding its opinion, discussing the question of equitably distributing the proceeds of the policies, says that there are two modes, "One is to ascertain, if it be possible, the actual value of the policy at the date of the adjudication in bankruptcy and the equitable apportionment of that value among the respective interests in the policy; and then in analogy to the declared policy of the law as stated in the proviso, to permit the bankrupt if he so desire, to pay to the trustee that proportion of the actual value which would be coming to him at the time stated and upon the plan suggested, and that the trustee thereupon convey all claim to the policy to the bankrupt.

The other plan is to direct a sale by the trustee of the interest of the bankrupt in the policy at the date of the adjudication in bankruptcy."

Each of these decisions indicates the difficulties met in trying to adjust the eqiuties of the parties when the plain language of the statute is departed from.

More than passing discussion of the decision of the Supreme Court in the recent case of Holden vs. Stratton (198 U. S., 202) would be superfluous.

We note that one of the policies under discussion there was written on the tontine plan, the same as the policies here, and contained the same provision regarding the exercise of the various options at the expiration of the twenty year period.

That such policy was construed to be a life insurance policy and embraced by a statute exempting life insurance policies in general terms.

That the purpose of the proviso of Section 70a was to confer a benefit on the insured bankrupt, and that an interpretation incompatible with its spirit was to be avoided.

In conclusion, the Court having before it in the briefs and argument of counsel, the several authorities relied upon by the respective parties to this litigation, expressed its opinion upon the precise question under discussion here, in the following terms: (page 214).

> "There has been some contrariety of opinion expressed by the lower Federal courts as to the exact meaning of the words cash surrender value as employed in the proviso, some courts holding that it means a surrender value expressly stipulated by the contract of insurance to be paid, and other courts holding that the words embrace policies, even though a stipulation in respect to surrender value is not contained therein, where the policy possesses a cash value which would be recognized and paid by the insurer on the surrender of the policy. It is to be observed that this latter construction harmonizes with the practice under the Bankruptcy Act of 1867, *in re* Newland, 6 Ben., 342; *in re* MacKinney, 15 Fed. Rep., 535, and tends to elucidate and carry out the purpose contemplated by the proviso as we have construed it. However, whatever influence that construction may have, as the question is not necessarily here involved, we do not expressly decide it."

We are disinclined to consider this deliberate statement as a "chance remark" as suggested on page 7 of Petitioner's brief.

On the contrary, noting and respecting the reservation in the concluding words just quoted, we believe that the opinion taken in its entirety is authority for the claim urged by respondent, and that the construction of the

statute under consideration, there suggested does, as the Court found, preserve to the bankrupt the benefits contemplated by the proviso "harmonize with the practice under the previous Bankruptcy Act," and "elucidate and carry out the purpose contemplated by the proviso;" as in such opinion construed.

II.

Insurance policies having no cash surrender value do not pass to the trustee as assets.

The above point does not become of consequence unless the Court shall find that the policies in question are not policies having a cash surrender value.

Our reasons for believing that it was not the intention of Congress that insurance policies, upon the surrender and cancellation of which no sum could be obtained, should pass to the trustee are as follows:

1. It had been held under the Bankruptcy Act of 1867 which contained no provision reserving any right in insurance policies to the bankrupt, that only the cash surrender value of the policies passed to the trustee.

In re MacKinney 15 Fed. Rep., 535.
In re Newland, 6 Ben., 90.

2. It had likewise been held under that act, in the light of decisions of the Supreme Court, that the trustee

had no such insurable interest in the life of the bankrupt as would enable him to take out or continue policies of insurance on his life.

"The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name."

Warnock vs. Davis, 104 U. S., 775, 779.
New York Life Insurance Co. vs. Armstrong, 117 U. S., 591.
Crotty vs. Union Mutual Insurance Co., 144 U. S., 621.
In re MacKinney, 15 Fed. Rep., 535, 539.

3. It is not practical or consistent with public policy that the trustee shall continue contracts of insurance on the life of a bankrupt or that he shall sell them to others having no insurable interest in the life for the purpose of wager or speculation.

In determining matters of public policy, and in construing the United States Statutes with reference to that policy, the law of the United States, not the law of the State where the bankrupt resides, should control.

4. It would deprive bankrupts holding certain old line or old form policies, assessment and fraternal policies, of their insurance, with little or no benefit to the trust estate.

5. The proviso does not by its language contemplate that policies of insurance pass to the trustee subject to re-

demption in particular cases by the bankrupt, but clearly evidences that only such policies pass as have a cash surrender value, which the insured refuses to pay.

The act does not say that the bankrupt upon paying within the stipulated time, the cash surrender value of the policy, may redeem same from the trustee but that the bankrupt may upon such payment, "*continue* to hold, own and carry said policies." *Upon the expiration of the stipulated time,* if he fails to make such payment, "the policy shall *pass* to the trustee as assets."

If the policy, as contended, becomes assets in the hands of the trustee by reason of the general provisions of subdivision 5, there would be no force to the language, the bankrupt "shall *continue* to hold, own and carry." There would be no occasion for enacting that if the bankrupt failed to pay the cash surrender value within thirty days after it was ascertained, then the policy should *pass* to the trustee as assets.

6. The construction contended for here is supported by the following cases in the lower Federal Courts decided under the present Bankruptcy Act.

In re Lange, 91 Fed. Rep., 361.
In re Hernich, 1 Am. B. R., 713.
In re Buelow, 98 Fed. Rep., 86.
In re Josephson, ~~116~~ 121 Fed. Rep., ~~404~~ 142.
Morris vs. Dodd, 94 Georgia, 606.

III.

The decision of the Circuit Court of Appeals correctly determines the rights of the respective parties preserving to the trustee the full cash surrender value of the policies and confirming in the bankrupt, the title thereto after the payment of such surrender value. It gives effect to the plain language and intent of the statute and its judgment should be sustained.

DORR RAYMOND COBB,
Counsel for Respondent.

Supreme Court of the United States.

No. 209.—October Term, 1906.

Albert K. Hiscock, Trustee in Bankruptcy of Jacob M. Mertens, Charles R. Mertens, Ernest T. Mertens, and Edmund A. Mertens, individually and as composing the copartnership firm of "J. M. Mertens & Co.," Bankrupts, Petitioner, *vs.* Jacob. M. Mertens.	On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 25, 1907.]

Mr. Justice McKenna delivered the opinion of the Court.

The question in this case is whether the cash surrender value of a policy of insurance under sections 70–2–5 of the bankruptcy act must be provided for in the policy, or whether it be sufficient, if the policy have such value by the concession or practice of the company. Section 70 provides that "the trustee of the estate of a bankrupt upon his appointment and qualification . . . shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property . . . (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person . . . (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided*, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of the estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

The respondent and his sons, individually and as composing the copartnership of J. M. Mertens & Co., were declared bankrupts, and petitioner was elected the trustee of their estate October 14, 1903.

At the time the petition in bankruptcy was filed Mertens held four life insurance policies issued by the Equitable Life Assurance Society of the United States. One of the policies, payable to his wife if she should survive him, has been dropped from this controversy. The other three policies were payable to Mertens at his death, his executors, administrators or assignees. They were subject to certain claims arising from their having been assigned as security for certain loans. With these we are not concerned.

A dispute arose as to the ownership of the policies, and the trustee filed a petition in the District Court for the determination of the ownership of them and that Mertens be required to make an assignment of them to the trustee. Mertens answered, alleging that the policies had, by law and the regular practice of the Equitable Life Assurance Society, a cash surrender value which he had sought to pay to the trustee, and was ready and willing to pay; that it was the uniform practice of the society to pay, upon the surrender of such policies and on policies issued on any of the blank forms shown by the policies, the cash value thereof "determined in accordance with a fixed and definite method of computation, and stated on demand, by any policy holder or person in interest;" that the society, pursuant to law and in accordance with its practice, had stated to him and declared the cash surrender value of each of the policies and its readiness and willingness to pay such value upon the surrender of the policies. The values were stated.

The matter was referred to a special master to take the proofs and report the same, with findings of fact and conclusions of law. Proofs were taken and a report made in accordance with the order of the court. The master, in his report, describing the policies, said:

"None of these express any agreement or provision whereby upon default the company shall pay a 'cash surrender value' to any person. By their terms the assured is excluded from any participation in dividends until the completion of the tontine period, at which time all surplus and profits derived from such policies are to be divided among the persistent policies of that class then in force. At the expiration of the tontine period the persistent policy holder is given certain options, among them to withdraw in cash the policy's entire share of the assets, that is, the accumulated reserve, the amount of which is stated in each policy, and, in addition, the accumulated surplus apportioned to the policy. Each of these policies also provides that upon default in payment of a premium and the surrender of the policy within six months thereafter the assured shall be entitled to a new paid-up policy, based upon the reserve accumulated under the old policy, but 'without participation in profits.' Both funds secured by the agreement, namely, the insurance proper and the endowment fund representing the accumulated profits, are payable to the assured or to his executors, administrators or assigns. No other person is mentioned in either of the policies as having any beneficial interest therein."

It appeared from the testimony that as a matter of fact policies of the character of those in controversy had, under the practice of the company, cash surrender values, if offered for surrender within six months from the date of the non-payment of any premium. Explaining this, a witness said: "To make clear the replies of previous questions I will state that the Equitable Life Assurance Society would decline to purchase for cash a policy during the period for which premiums had been paid, entitling the policy holder to protection for the face value, for the reason that in the event of the death of the holder of that policy before the expiration of the period for which premiums had been paid, the question would be raised as to the liability of the company, so that the payment of an amount of cash for the surrender of a policy is only made by the company after that policy has lapsed by reason of the non-payment upon its due date." And it was testified that the cash surrender values of policies was determined by a fixed and definite method of computation, uniform in all cases, and had, without exception, been paid to persons insured by the company. It further appeared that the surrender values of the policies in controversy were as follows: Policy No. 274445, $5,905.65; policy No. 417678, $2,272.56; policy No. 417171, $6,574.00.

It was further testified that the surrender value of each policy was equivalent to the amount of a paid up-policy, which the company was willing to give. Or, as expressed by a witness, "it is equivalent to the percentage reserved under that policy (referring to policy No. 274445,) which the company is willing to pay in consideration of the surrender."

The District Court held that the policies had no cash surrender value within the meaning of section 70 of the bankrupt act. The court said:

"In the policies in question not only is there a failure to provide for a cash surrender value, but the provisions are inconsistent with the existence of such a value. This, however, is not at war with the fact that the Assurance Association may be willing to pay money for the surrender of such policies. There is no pretence that this custom of the insurer formed a part of the contract between the parties, or that the insured could enforce the payment of a surrender value, or the payment of anything, on surrendering the policy. In short, the insurer might be willing to pay a surrender value and might not. Such payment would be optional with it."

And again:

"The association might be willing to pay one day, entirely unwilling the next. Is this the 'cash surrender value' spoken of in the bankruptcy law? This court thinks not. It would seem that had Congress intended that every bankrupt holding a policy of insurance of the nature of these should retain the same as his own on paying to the trustee in bankruptcy the value thereof that the insurer might fix by its custom or otherwise, it would have used language appropriate to that end, and not an expression implying a value the insured has a legal right to demand, and the insurer may be compelled to pay, a value generally understood to be provided for in the policy itself."

The court cited, to sustain its views, *In re Welling*, 113 Fed. Rep. 189, and *In re Stingluff*, 106 Fed. Rep. 154.

An order was entered requiring Mertens to assign the policies to the trustees. It was reversed by the Circuit Court of Appeals. The latter court, however, said, that "it should be inclined to concur with the views expressed in *In re Welling*, and to sustain the conclusion of the District Judge in the cause at bar, that 'no policy is understood to have a cash surrender value unless provided for in the policy so as to be enforceable by the insured,' were it not for a subsequent expression of opinion by the Supreme Court. This is found in *Holden* v. *Stratton* (198 U. S. 214) as follows:

"'There has been some contrariety of opinion expressed by the lower Federal courts as to the exact meaning of the words 'cash surrender value' as employed in the proviso, some courts holding that it means a surrender value expressly stipulated by the contract of insurance to be paid, and other courts holding that the words embrace policies, even though a stipulation in respect to surrender value is not contained therein, where the policy possesses a cash value which would be recognized and paid by the insurer on the surrender of the policy. It is to be observed that this latter construction harmonizes with the practice under the bankrupt act of 1867, (*In re Newlands*, 6 Ben. 342; *In re McKinney*, 15 Fed. Rep. 535,) and tends to elucidate and carry out the purpose contemplated by the proviso as we have construed it. However, whatever influence that construction may have, as the question is not necessarily here involved we do not expressly decide it.'"

The court observed that the extract from *Holden* v. *Stratton* was obiter to the questions decided in the case, but considered it such an explicit declaration of views that the court expressed hesitation to disregard it.

We are hence confronted with the problem whether the obiter of *Holden* v. *Stratton* shall be pronounced to be the proper construction of section 70 of the bankrupt act. We may remark at the commencement that that obiter was not inconsiderately uttered, nor can it be said that it was inconsequent to the considerations there involved. It was there necessary to determine between conflicting decisions of two Circuit Courts of Appeals upon the effect of State statutes of exemption from liability for debts, and a careful consideration of section 6 of the bankrupt act, which provided for exemptions, and section 70, which defined the property which passed to the trustee, was necessary to be made and their proper effect and relation determined. As elements in that consideration the meaning and scope of section 70 were involved and the purpose of Congress in its enactment. Section 6 provides for exemptions "prescribed by the State laws." Section 70 vests the title of all the property of the bankrupt in the trustee, "except in so far as it is to property which is exempt." Then, after a designation of the property the title to which is

transferred, follows the proviso in regard to insurance policies. It was argued that the proviso would be meaningless unless considered as wholly disconnected from the clause as to exempt property, and this court replied:

"As section 70*a* deals only with property which, not being exempt, passes to the trustee, the mission of the proviso was, in the interest of the perpetuation of policies of life insurance, to provide a rule by which, where such policies passed to the trustee because they were not exempt, if they had a surrender value their future operation could be preserved by vesting the bankrupt with the privilege of paying such surrender value, whereby the policy would be withdrawn out of the category of an asset of the estate. That is to say, the purpose of the proviso was to confer a benefit upon the insured bankrupt by limiting the character of the interest in a non-exempt life insurance policy which should pass to the trustee, and not to cause such a policy when exempt to become an asset of the estate. When the purpose of the proviso is thus ascertained it becomes apparent that to maintain the construction which the argument seeks to affix to the proviso would cause it to produce a result diametrically opposed to its spirit and to the purpose it was intended to subserve." 198 U. S. 213.

And, contemplating the proviso as having such purpose, the court used the language quoted by the Circuit Court of Appeals, and expressed the view that, as between the two constructions that had been made of the terms, "cash surrender value," whether they meant a stipulation in the contract or the recognition by the company, the latter harmonized with the practice under the bankrupt act of 1867 and tended to elucidate and carry out the purpose contemplated by the proviso as the decision construed it. And the precedent practice is necessarily a strong factor and would be so even if it had a less solid foundation in reason. It is nowhere better expressed than in *In re McKenney*, 15 Fed. Rep. 535. It is there pointed out that the foundation of the surrender value of a policy is the excess of the fixed annual premiums in the earlier years of the policy over the annual risk during the later years of the policy. "This excess," it was said, "in the premium paid over the annual cost of insurance, with accumulations of interest, constitutes the surrender value."

And further:

"Though this excess of premiums paid is legally the sole property of the company, still in practical effect, though not in law, it is moneys of the assured, deposited with the company in advance, to make up the deficiency in later premiums to cover the annual cost of insurance instead of being retained by the assured, and paid by him to the company in the shape of greatly increased premiums when the risk is greatest. It is the 'net reserve' required by law to be kept by the company for the benefit of the assured, and to be maintained to the credit of the policy. So long as the policy remains in force the company has not practically any beneficial interest in it, except as its custodian, with the obligation to maintain it unimpaired and suitably invested for the benefit of the assured. This is the practical, though not the legal, relation of the company to this fund

"Upon the surrender of the policy before the death of the assured the company, to be relieved from all responsibility for the increased risk, which is represented by this accumulating reserve, could well afford to surrender a considerable part of it to the assured, or his representative. A return of a part in some form or other is now usually made. . . ."

In *In re Newland*, 6 Ben. 342, it was said that the present value of a policy is its cash surrender value, and but for that "it could not be said to have any appreciable value. *Parker* v. *Marquis of Anglesey*, 20 Weekly Reporter, 162, and 25 Law Times Rep., new series, 482."

There is no expression in either of the cases that the cash surrender value depended upon contract as distinct from the usage of companies. And section 70 expresses no distinction. At the time of its enactment there were policies which stated a surrender value and a practice which conceded such value if not stated. If a distinction had been intended to be made it would have been expressed. Able courts, it is true, have decided otherwise, but we are unable to adopt their view. It was an actual benefit for which the statute provided, and not the manner in which it should be evidenced. And we do not think it rested upon chance concession. It rested upon the interest of the companies and a practice to which no exception has been shown. And that a provision enacted for the benefit of debtors should recognize an interest so substantial and which had such assurance was perfectly natural. What possible difference could it make whether the surrender value was stipulated in a policy or universally recognized by the companies. In either case the purpose of the statute would be subserved, which was to secure to the trustee the sum of such value and to enable the bankrupt to "continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of the estate under the bankruptcy proceedings."

Counsel for petitioner argues that the policies are mere investments, and intimates the injustice of keeping them from the trustee, and illustrates the comment by contrasting what the company would have paid as the surrender value of policy No. 274445, if default had been made in payment of premiums, and what the company would pay six months thereafter. The contrast is between $5,905.65 and $11,318.40. But this is the result of the age of the policy, and cannot be a test of other policies or of the construction of the law. And a precisely like effect would result if the policy expressed a surrender value, in which case, it is conceded, it would come under the law. The same comment is applicable to other arguments of petitioner which tend to confound the distinction between surrender value and other value. Section 70 deals with the former, and makes it the conditions of the relative rights of the bankrupt and the trustee of his estate. Pursuing the argument farther, it is said that "the right to participate in the profits was a part and parcel of the policy and of the privileges enjoyed

thereunder;" and it is further observed that the difference between the value of the policy which was used for illustration, "if lapsed on September 8, 1903, given as $5,905.65, and its value on March 8, 1904, $11,318.40, is chiefly made up of the value of this right to participate in profits." And counsel for petitioner is disposed to think the contention absurd that the bankruptcy law contemplated that such a valuable right "could be absolutely wiped out and taken from the trustee in such a case as this by allowing the bankrupt to take up the policy by paying what the bankrupt here claims to be the surrender value." Such result would not appear to be absurd if the policy were only two years old instead of nineteen years. Manifestly a policy cannot be declared in or out of the law according to its age, nor can anything be deduced from the investment features of tontine policies. Such policies were decided to be covered by the law in *Holden* v. *Stratton*. Whether the law should have included them is not our concern. Whatever may be said against it, it has seemed best to the legislature to encourage the extra endeavor and sacrifice which such policies may represent.

It is further contended that respondent has not made out that the policies have a cash surrender value, because it appears from the evidence that the company would not accept their surrender until they had lapsed, and that they had not lapsed either when the petition was filed or the bankruptcy adjudged. But this is tantamount to saying that no policy can ever have a surrender value. According to the testimony, policies which have a stipulation for such value are subject to the same condition. And there is nothing in the record to show that the practice and policies of other companies are not the same as those of the Equitable Life Assurance Society. Section 70 is broad enough to accommodate such condition. It permits the redemption of a policy by the bankrupt from the claims of creditors by paying or securing to the trustee the cash surrender value of the policy "within thirty days" after such value "has been ascertained and stated to the trustee by the company issuing the same."

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.